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In the Supreme Court of the United States

OCTOBER TERM, 1996

TIMOTHY SCOTT SHERMAN,

Petitioner

v.

WILLIAM L. SMITH, Warden, Maryland House of Correction–Annex, and JOHN JOSEPH CURRAN, JR., Attorney General for the State of Maryland,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

ANDREW L. FREY
Counsel of Record
ROY T. ENGLERT, JR.
THOMAS DiLENGE
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

STUART J. ROBINSON
24 E. Pennsylvania Avenue
Bel Air, Maryland 21024
(410) 879-5050

Counsel for Petitioner

126 pp

QUESTION PRESENTED

Several days into the criminal trial in this case, a juror who was dissatisfied with the evidence presented in the courtroom regarding key — and seriously disputed — physical aspects of the crime scene conducted his own independent and unauthorized investigation of that location. The state courts affirmed the conviction on direct appeal without ever recognizing the federal constitutional nature of the error that the juror's investigation caused and without ever applying the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). Two Justices of this Court recorded votes dissenting from denial of certiorari. *Sherman* v. *Maryland*, 498 U.S. 950 (1990). A panel of the Fourth Circuit subsequently ordered that a writ of habeas corpus be granted because of the Sixth Amendment violation, but the court granted rehearing en banc and ordered denial of the writ, over four dissents, on the ground that the Sixth Amendment error was not structural, not subject to *Chapman* review, and harmless.

The question presented is whether the juror's independent inspection of a crime scene whose physical characteristics were a crucial and sharply contested issue at trial requires habeas relief, either because (a) it is a structural error in the trial mechanism that defies harmless-error analysis, (b) it is subject to review (and not harmless) under the *Chapman* standard rather than the more deferential *Brecht-Kotteakos* harmless-error standard applied by the Fourth Circuit, or (c) it is not harmless under the *Brecht-Kotteakos* standard, which the court below misinterpreted by focusing on the *sufficiency* of the evidence against the defendant rather than on the potential prejudicial effect of the juror's independent evidence-gathering on the verdict.

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PETITION FOR A WRIT OF CERTIORARI

Timothy Scott Sherman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc Fourth Circuit (App., *infra*, 1a-41a) is reported at 89 F.3d 1134. The opinion of the Fourth Circuit panel (App., *infra*, 42a-48a) is unreported. The opinion of the district court (App., *infra*, 49a-58a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2254(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

Before the evening nine years ago when his parents were murdered in their sleep, petitioner Timothy Scott Sherman — at the time only 18 years old — had never been in trouble with authorities, had no history of mental illness, and had a loving and respectful relationship with his two parents. Now, despite the steadfast support of his deceased mother's family, who firmly believe in his innocence, petitioner stands convicted of those murders based on questionable circumstantial evidence, and will remain imprisoned for most of his life as a result of an error-plagued trial that was, by any reasonable standard, fundamentally unfair.

Several days into petitioner's trial, a member of the jury — dissatisfied with the State's evidence regarding disputed physical aspects of the crime scene directly bearing on the question of petitioner's guilt — conducted his own independent investigation of that location. The juror did not disclose this site visit to the court or the parties until after the verdict; however, he did discuss his investigation with other jurors during the trial. App., *infra*, 43a.

If Timothy Sherman had been convicted in Georgia, New York, Pennsylvania, or any State within the territory of the United States Court of Appeals for the Ninth Circuit, he would have received a new trial, on federal constitutional grounds, as a result of the juror's actions. As courts in these jurisdictions have recognized, a juror who engages in independent evidence-gathering regarding contested issues at trial becomes in essence a witness in the case, irreparably violating the defendant's constitutional rights in a manner that cannot be excused as harmless. Yet the courts below denied relief. This Court thus serves as Timothy's last chance to receive the fair trial to which the Constitution entitles him. For this reason, and to resolve the sharply conflicting interpretations of the Constitution that have been adopted by the courts below and by other state and federal courts, the Court should grant certiorari.

1. While they were asleep in their bed in the early morning of October 12, 1987, Ann and Stevenson Sherman were murdered by two shotgun blasts coming from the doorway to their bedroom. The murderer then entered the small room, which was blanketed with a "haze" of gunpowder residue from the two blasts (C.A. App. 85-86, 136b), and walked over to his or her victims, presumably to make sure they were dead, in the process altering the position of the bodies and bedcovers. C.A. App. 126b, 136a. After fleeing the house, the murderer apparently stopped to hide the shotgun deeply inside a thick pine tree located on the side of the road used to exit the subdivision in which the Shermans lived.

Witnesses testified at trial that Timothy Sherman, the victims' 18-year-old son, said that he was asleep when he was awakened by the sound of a gunshot, his mother's scream, and then another gunshot. C.A. App. 52, 80. Timothy's consistent version of events — uncontradicted by independent evidence — was that he remained in his bedroom for several minutes, out of fear, but then quickly dressed and ran to the nearby home of his maternal grandfather,

William Gibson, to report what he had heard. *Ibid.* Gibson described Timothy as "very much out of breath and upset." C.A. App. 52. The two returned to the Shermans' house, where Gibson checked the bodies and told Timothy that his parents were dead; Timothy began to cry again. C.A. App. 52-53. Gibson then called other family members and the police. C.A. App. 54. The Sherman house quickly filled with family members, neighbors, police officers, and medical personnel. C.A. App. 78-84a.

The police who arrived on the scene immediately focused on Timothy as a suspect, and thereafter made two discoveries that would form the core of the State's case against him at trial. First, the police found the shotgun — which belonged to the Shermans[1] — in the pine tree, which was located on the Gibson property.[2] Second, the police discovered under Timothy's mattress a box containing shotgun shells similar to the expended shells found in the hallway outside of his parent's bedroom.

But the police investigation was more notable for the evidence that it *failed* to find. Although the police twice tested Timothy for gunpowder residue within hours of the crime — once using a highly sophisticated neutron activation test — they did not uncover any evidence linking him to the recent discharge of a firearm.[3] C.A.

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[1] The shotgun contained Timothy's fingerprint — a wholly unremarkable fact given that he had used the gun for hunting as recently as a day before the murders (C.A. App. 121), something that Timothy had reported to the police on the morning after the shooting and before the discovery of his fingerprint. Furthermore, the prints on the gun could have dated from days or even months before the murders. C.A. App. 173. As the FBI fingerprint expert admitted at trial, another person could have used the gun without leaving his own prints or disturbing Timothy's prints by, for example, wearing gloves. C.A. App. 174-177.

[2] There was testimony at trial that Timothy Sherman had once before hidden an object in that pine tree (C.A. App. 63a), but there also was testimony showing that the pine tree — because of its location near a bus stop and on the subdivision's main road — was a common neighborhood hiding place for all kinds of items. C.A. App. 189-192.

[3] At trial, the FBI agent called by the *State* testified unequivocally that "the amounts of antimony and barium present * * * are insignificant, and

App. 117-123, 152. This failure was "especially notable because a heavy accumulation of residue was found in Timothy's parents' bedroom" (App., *infra*, 61a), and a test firing of an identical weapon, which revealed that residue spewed backward through the breach of the gun (C.A. App. 199-204). Likewise, no blood was found on Timothy's clothes or person, or in his bedroom, even though the murderer had moved the victims' bloody bodies and bedcovers.[4]

No witnesses heard shots or saw any activity bearing on the murders. The investigators also failed to discover any evidence of friction between Timothy and his parents, or any other motive or reason for this normal young man to murder in cold blood the parents he loved.[5] And, from the initial interrogation immediately after the murders through the present, Timothy Sherman has continually professed his innocence of this crime, without contradiction or inconsistency, and with the full support of many of his immediate relatives — including the parents of one of his alleged victims.

In addition, each of the two pieces of inculpatory circumstantial evidence was problematic. In a classic "rush to judgment," the police failed to test the box of shotgun shells for fingerprints,

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therefore, *it could not be determined if the person from whom the swabs were taken had discharged a firearm or been in an environment of shotgun primer residue.*" C.A. App. 152 (emphasis added). The police also microscopically analyzed Timothy's clothes for such evidence, to no avail.

[4] Obviously concerned about the weaknesses in its case, the State suggested to the jury in closing argument that Timothy could have washed off all evidence of gunpowder residue and blood. However, there was *no* evidence at trial supporting this suggestion; in fact, the Shermans' bathroom was checked for evidence of recent use, such as dampness in the towels, but none was found. C.A. App. 139, 150.

[5] Over objection, the prosecution was permitted to introduce testimony that two individuals claimed that Timothy had falsely stated to them before the murders that he had seen his parents killed in a automobile accident. C.A. App. 45-46, 50. The Maryland Court of Special Appeals ruled that the admission of this evidence was erroneous, but harmless, even though the prosecutor's closing argument emphasized this testimony as a possible (and the only) motive for the murders. C.A. App. 209-210.

assuming (but never proving) that it was Timothy Sherman who had placed the box under his own mattress, and never inquiring whether someone else might have done so (before or after the murders). App., *infra*, 61a. This possibility was far from fantastical: several people in addition to Timothy had access to the house at all times, and the police did not discover the box of shells for several hours after the Sherman house filled with people in the immediate aftermath of the crime. C.A. App. 46m, 48-49, 133-115.[6] And the shells found under Timothy's mattress could not be conclusively matched with the shells used to commit the murders.

As for the gun in the tree, the police found the weapon so deeply inside the thick pine tree — approximately three feet — and shoved in with such force that it took several officers working together to get the gun out of the tree. C.A. App. 141-143. Police Corporal Edward Hopkins, a strong six-footer who recovered the gun, would later admit under cross-examination that, "[w]ith my size and stature, I would have had difficulty putting the gun inside the tree in the condition I found it." C.A. App. 141. Hopkins weighed 210 pounds and worked out regularly; Timothy Sherman, by contrast, weighed only 130 pounds. C.A. App. 142-143. Moreover, an inspection by the police of Timothy's hands and clothes shortly after the murders revealed no signs of pine needles or pine tar, as might have been expected if Timothy had been the one who hid the gun in the thick, sappy tree. C.A. App. 143-144.[7]

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[6] It was established at trial that other family members on the paternal side (who had more of a motive for killing the Shermans than Timothy, and who lived less than a mile from the Shermans) had keys to the Sherman house, had helped install the alarm system and knew how to deactivate it, and had hidden other Sherman-family guns under Timothy's mattress on the evening following the murders. C.A. App. 46m, 48-49, 113-115; 3 Tr. 99, 116, 139-140, 143-144. The trial judge, however, wrongly refused to permit the defense to introduce evidence of friction between Stevenson Sherman and his immediate family. C.A. App. 34-35.

[7] The murders occurred in the early morning hours of October 12, but the juror's visit to investigate the tree took place sometime in May. The condition of the tree, in particular the degree to which it was giving off sap, dropping needles, or covered with dew, could have been significantly different when viewed by the juror in the spring than it was at the time of

2. Despite the weakness of the circumstantial evidence, the lack of gunpowder and pine tree residue, and no apparent motive, the State of Maryland charged and tried Timothy Sherman for the murder of his parents. Because the bare discovery of the shotgun shells under Timothy's mattress was so inconclusive, the gun in the tree became a truly vital part of the State's case at trial and was the "key evidence" against Timothy. App., *infra*, 61a. The State introduced numerous photographs (both close-ups and aerial) of the crime scene, the tree, and the Sherman-Gibson neighborhood to convince the jurors that Timothy had hidden the weapon in the tree.[8] Yet the jury, if it wished to credit that evidence as probative of his guilt, had to consider physical aspects of the tree bearing on whether it would have been possible for Timothy to put the gun there in the condition in which the gun was found, and whether he could have done so without getting any pine tar or needles on his body or clothes — the major unresolved mysteries in the State's case. The prosecutor found this issue so serious that he spent considerable time on the subject in his redirect examination of Corporal Hopkins (C.A. App. 147-149), and both sides argued the issue during closing arguments (C.A. App. 211-216). During deliberations, the jury requested clarification of the testimony it heard regarding the gun's retrieval from the tree. C.A. App. 216.

After the prosecution had presented its evidence regarding the tree and the surrounding area, but before jury deliberations had begun, juror Blane Miller decided that he was not satisfied with the state of the evidence regarding the tree. With his wife, Miller "went to the Sherman house * * * looking for a tree that was so involved in the case." C.A. App. 232. Miller found both the house and the tree. C.A. App. 232-233. Sometime during the trial, Miller disclosed the site visit to his fellow jurors, who, when deliberations began, were initially deeply divided on the question of Timothy's guilt.[9] The jury returned a guilty verdict, but on the

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the murders in the fall, rendering his impressions especially misleading.

[8] The State did not introduce photographs of the gun lodged in the tree.

[9] Several other jurors swore in affidavits presented in a state collateral review proceeding that (1) the initial poll was 8-4 in favor of a guilty verdict, (2) the trial judge went into the jury room and warned the jurors to

morning of sentencing juror Miller informed defense counsel about his unauthorized site visit. Defense counsel promptly moved for a new trial, arguing that the site visit violated Timothy's Sixth Amendment rights. The trial judge held a hearing at which Miller testified, but the court did not permit questioning about why Miller found a site visit necessary on top of the numerous photographs of the crime scene and tree shown at trial. C.A. App. 241.

However, when asked by the *State* whether, at the time of the site visit, several photographs of the tree already had been introduced into evidence, Miller answered "yes" and made clear the relationship between that evidence and his efforts to obtain additional information about the tree: "the tree had been in question, and that's one of the reasons why I went there." C.A. App. 23[illegible] [10]

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avoid a hung jury because a retrial would be expensive for the State (C.A. App. 236b-236c), and (3) the four unpersuaded jurors felt pressured into voting for conviction. The state judge who decided the collateral review case made a factual finding that the state trial judge had not engaged in the misconduct alleged, but he recognized that this case was sufficiently factually troubling that several of the jurors had regrets about their verdict. Judge Levitz wrote: "[A]ll three of these jurors had immediate second thoughts about the verdict. * * * Ms. Durka and Ms. Dowdy both initiated contacts with the Petitioner's attorneys and both have expressed regret regarding the verdict." *Sherman* v. *Rollins*, No. 90 CM 225, slip op. 7 (Balto. Cty. Cir. Ct. Oct. 25, 1990). It was the jurors' perceived second thoughts about their verdict that led Judge Levitz to disbelieve their testimony (*ibid.*) — second thoughts that suggest that this was *not* the kind of easy case in which a serious constitutional error may be forgiven as harmless. The state trial judge himself described this case as one of the most difficult ever to arise in Harford County. C.A. App. 239g.

[10] Alternate juror Anthony DelFrate corroborated this plain-language interpretation of juror Miller's remarks. Miller told DelFrate during trial that he had "visited the scene of the crime so that everything would be clearer in his mind," and Miller "specifically stated that he was not satisfied with the photographs of the tree." C.A. App. 256-257. In driving to the crime scene — on the opposite side of the county from where he lived — Miller violated specific instructions contained in the Juror Handbook that he received at the beginning of trial (C.A. App. 237-238), suggesting a deliberateness born out of necessity rather than mere curiosity.

At the close of this testimony, the trial judge — without ever acknowledging that a constitutional violation had occurred, and without ever demanding of the State any showing of harmlessness — denied petitioner's motion for a new trial, concluding that the issue of the crime scene had been "fully covered" at trial "[s]o that I think that [Miller's] activity is not of such magnitude as to warrant a new trial or reversible appeal [*sic*]." C.A. App. 254-255. The court took no account of the obvious fact that juror Miller felt that there was something significant to be learned — *in addition to* the crime scene evidence and testimony introduced at trial — by visiting the scene and inspecting, as Miller put it, "the tree that was so much in question." C.A. App. 239.[11]

3. On direct appeal, petitioner argued that juror Miller's crime scene inspection violated his Fourteenth Amendment and Sixth Amendment rights. Nevertheless, the Maryland Court of Special Appeals, in rejecting petitioner's contention, cited only a state-law civil case for the proposition that Sherman had the burden of showing prejudice, and then found that he had failed to sustain that burden. App., *infra*, 85a-86a. The Maryland Court of Appeals denied discretionary review, as did this Court, although two Justices recorded votes dissenting from the denial of certiorari. *Sherman* v. *Maryland*, 498 U.S. 950 (1990).

After state post-conviction proceedings raising other issues, Sherman filed a petition for a writ of habeas corpus in federal district court. The district court, improperly deferring to the state court findings regarding prejudice, denied habeas relief. The Fourth Circuit reversed that ruling because of the district court's failure to conduct a *de novo* review of the record to determine the nature of the constitutional error, *i.e.*, whether the error was "structural" or — if trial error — whether the State carried *its* burden of proving harmlessness. App., *infra*, 63a-64a. On remand, the district court again denied petitioner relief, holding that

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[11] There also is a serious question whether the physical aspects of the crime scene were, in fact, "fully covered." As federal District Judge Nickerson stated in *denying* Sherman habeas relief, the State's most critical photograph, a close-up of the tree, "does not show me anything on its face" (see App., *infra*, 22a) — a statement that supports juror Miller's conclusion seven years earlier about the state of the evidence on this issue.

the error was not structural and that the State had proved the error harmless. App., *infra*, 53a-58a. The court reasoned that any potential information gained by the site visit was merely "cumulative" of the crime-scene evidence introduced at trial, and that other evidence supported a jury finding that Sherman hid the weapon in the tree. App., *infra*, 57a. The court made those determinations even though it assumed for purposes of the petition that Miller's site visit had generated conclusions contrary to the evidence admitted at trial and damaging to Sherman. App., *infra*, 56a-57a (assuming that "Miller examined the tree, told other jurors that he disagreed with the photographs [introduced into evidence], and concluded that it was possible for Sherman to hide the gun in the tree in the condition in which it was found").

Petitioner again appealed to the Fourth Circuit, arguing that (1) a juror's independent inspection of critical and disputed aspects of the crime scene that bear on the question of guilt is a structural error requiring a new trial, (2) even if such an error is trial error, the applicable harmless-error standard is the "beyond a reasonable doubt" test of *Chapman*[12] rather than the more deferential *Brecht-Kotteakos*[13] standard because the state courts never applied *Chapman* on direct review, and (3) under any standard, the juror's site visit was not harmless.

Again, the Fourth Circuit reversed. In an unpublished opinion, it agreed with Sherman that, under either harmless-error standard, the error in his trial could not be considered harmless because the record strongly suggested that the juror visited the crime scene precisely to fill evidentiary gaps in the prosecution's case. App., *infra*, 46a. The court of appeals also noted, again, that the State's case against Timothy Sherman was "less than compelling" and "largely circumstantial." *Ibid*. The court granted a writ of habeas corpus and ordered that, unless the State retried and convicted Sherman within six months, he be released from custody. *Ibid*. One judge dissented. *Id*. at 46a-48a.

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[12] *Chapman* v. *California*, 386 U.S. 18 (1967).

[13] *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993); *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

The full court then granted the State's request for rehearing en banc. Over four dissents, the court affirmed the district court's denial of habeas relief. First, the court rejected Sherman's claim that the error in his case was structural, reasoning that, because *some* juror site visits *could* be harmless in the context of a particular case, *all* juror site visits fall within the category of mere trial error. According to the en banc majority, "before a court adds a new error to the list of structural errors * * *, the court must be *certain* that the error's presence would render *every* such trial unfair." App., *infra*, 6a (first emphasis added, second in original). In other words, errors that systematically render the fairness of a trial *uncertain* must, according to the court below, be treated as trial error, notwithstanding Sherman's argument that serious *uncertainty* about the effect of a class of errors on the fairness of criminal trials is the *defining* characteristic of structural error. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993) (*because* a particular error's "precise effects are unmeasurable" and its "consequences * * * are necessarily unquantifiable and indeterminate, [it] unquestionably qualifies as 'structural error'").

The court also rebuffed petitioner's argument that, if harmless-error analysis were to be applied, the proper test would be the *Chapman* "beyond a reasonable doubt" standard. Explicitly disagreeing with several Eighth Circuit decisions, the majority held that federal courts must apply the more deferential *Brecht-Kotteakos* harmless-error test in all collateral cases, regardless of whether the state courts assessed the impact of the error under the *Chapman* standard on direct appeal. App., *infra*, 10a-12a.

Finally, the majority held that, under the *Brecht-Kotteakos* test, the site visit did not have a "substantial and injurious effect or influence in determining the jury's verdict," for two reasons. First, whatever potential information juror Miller gained about the pine tree, even if contrary to the evidence at trial and damaging to Sherman, was merely "cumulative" of "substantial other evidence" at trial that showed that Sherman could have put the gun in the tree. App., *infra*, 13a.[14] Second, the "powerful array of evi-

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[14] As noted earlier, this "substantial other evidence" consisted solely of testimony that Sherman (along with others in the neighborhood) had

dence" against Sherman suggested that his claim of error "is nothing more than a roundabout way for Sherman to challenge the *sufficiency of the evidence against him.*" App., *infra*, 15a (emphasis added).[15] Because Sherman conceded that the State had presented sufficient evidence to sustain a conviction reached in an *error-free* trial, the majority concluded that he was not entitled to reversal of his *constitutionally tainted* conviction.

The principal dissent (by three judges) agreed with Sherman that the error in his case was "fundamental and structural" because it "violate[d] basic trial structure and taint[ed] the entire process":

> Allowing a juror to conduct his own investigation outside the courtroom in an attempt to answer questions that arose in the criminal matter before him certainly "affects the framework within which the trial proceeds" and justifies automatic reversal of the conviction. [*Arizona* v.] *Fulminante*, 499 U.S. [279], 309-310 [(1991)]. I therefore do not believe that we can say that Sherman's trial "reliably serve[d] its function as a vehicle for determination of guilt or innocence, and that [the] criminal punishment may be regarded as fundamentally fair." *Id.* at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). It is not fundamentally fair to the parties for a juror, in effect, to conduct privately his own trial.

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used the pine tree as a hiding place for a different item on a prior occasion and that the tree was located on the Gibson property, to which Sherman ran to report the murders. The majority's assertion that the tree was "on the route between the Sherman and Gibson houses" (App., *infra*, 14a) is factually erroneous; one would have to proceed *past* the Gibson house to get to the tree from the Shermans'. C.A. App. 104, 107.

[15] Aside from the facts already noted in this petition, the only other evidence comprising the majority's "powerful" record of guilt was the lack of any indication of forced entry and the presence of an alarm system in the Sherman home. App., *infra*, 14a. Yet, as noted above, several other people had access to the Sherman home and knew how to deactivate the alarm (see note 6, *supra*); also, there was evidence that the alarm system may have been malfunctioning or turned off on the night of the murders. C.A. App. 84e-84f, 184, 184a. Indeed, *the State* has argued previously that the alarm system was, in fact, turned off that evening. Brief of Appellees, at 5 (4th Cir., No. 94-6831) (Dec. 27, 1994).

App., *infra*, 28a-29a. The dissent relied on *United States* v. *Noushfar*, 78 F.3d 1442 (9th Cir. 1996), which held that a jury's listening to tapes that had never been played in court was structural error because the jury's consideration of evidence is "a stage of the trial at which the presence of the defendant is required," and because the error was "so fundamental and defie[d] meaningful review." 78 F.3d at 1444-1445 (internal quotation marks omitted). The dissent stated that the majority's contrary conclusion in this case "create[s] a circuit split [with *Noushfar*] inviting the Supreme Court to grant *certiorari*." App., *infra*, 26a n.13.

The dissent also disagreed with the majority's harmless-error analysis, stating that "[a]ctual, secret, physical inspection of the tree can in no way be construed as 'cumulative' of the evidence presented at trial" because "[t]he juror presumably would not have made his outing if that evidence were sufficient for him to resolve the issues in dispute." App., *infra*, 20a-22a. The dissent emphasized the "conflicting testimony on these issues and the unrevealing photographs of the tree [presented at trial]." App., *infra*, 17a.

The second, partial dissent, written by Judge Motz, concurred in the majority's conclusions regarding structural error and the standard of review, although Judge Motz made clear that, had she been writing on a clean slate, she would have held the site visit to be structural error.[16] Referring to the list of errors that this Court has previously recognized as structural, Judge Motz stated:

> After all, of what consequence is the right to counsel, to an impartial judge, to a public trial, to a correct reasonable doubt jury instruction, or to a criminal trial at all, if a defendant can be convicted based on evidence not presented at trial[?] * * * [W]hen a verdict is not based solely on evidence presented at trial, "there has been no jury verdict within the meaning of the

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[16] Judge Motz felt bound by precedent not to hold that the juror site visit was structural error; however, she added that, when presented with an appropriate case, this Court "might conclude that even if harmless-error analysis applies to unauthorized contacts with jurors, a juror's unsupervised and unauthorized visit to examine for himself the disputed physical aspects of a site presents a more fundamental problem meriting treatment as structural error." App., *infra*, 35a.

> Sixth Amendment" and so "no object . . . upon which harmless error scrutiny can operate." *Sullivan*, 508 U.S. at 280. The most an appellate court can conclude in the case at hand is that a jury would surely have found the defendant guilty based on the evidence presented at trial. A court cannot conclude anything about the jury's actual finding of guilt, because that finding was based to some unknown extent on evidence that was *never* presented at trial. *Cf. id.* at 279-280.

App., *infra*, 31a-33a (footnote omitted).

Turning to the harmless-error inquiry, Judge Motz concluded that, though juror Miller's ambiguous testimony at the new trial hearing *could* be interpreted in a way that might render the site visit harmless, his testimony also "would be equally consistent with a scenario in which, dissatisfied with the evidence presented at trial, he set out to conduct his own investigation," which would "certainly be prejudicial." App., *infra*, 38a. She continued:

> [I]t would not be merely "cumulative" of the other evidence at trial, as the proper interpretation of that evidence was disputed. For example, perhaps confused by the parties' conflicting interpretations of Officer Hopkins' testimony, the juror sought to resolve for himself whether someone of Sherman's height and build could have wedged the gun in the tree in the manner in which it was found. Alternatively, perhaps the juror wanted to test whether it was possible to hide something in the tree without getting sap and pine needles on one's clothing, or wanted to see whether it made sense for Sherman to have stopped at the tree *en route* to his grandparents' house. Each of these scenarios would result in the discovery of *new*, rather than cumulative, information.

Ibid. Accordingly, Judge Motz joined her three colleagues in dissenting from the denial of habeas relief.

REASONS FOR GRANTING THE PETITION

As both the majority and dissenting opinions recognized, the decision of the Fourth Circuit in this case conflicts with decisions of other appellate courts. The majority opinion also fundamentally misapprehends and misapplies several prior decisions of this Court in important and frequently arising areas of criminal law. Further, the decision of the court below is erroneous and, if left unreviewed,

will ensure that young Timothy Sherman remains imprisoned for most of his life without ever receiving a fair trial, and for a crime that there is substantial reason to believe he did not commit. For these reasons, the Court should grant certiorari.

I. A JUROR'S INDEPENDENT INSPECTION OF CRITICAL AND DISPUTED ASPECTS OF A CRIME SCENE IS STRUCTURAL ERROR

A. The Court of Appeals' Decision Is in Conflict with the Decisions of Three State Courts of Last Resort and the Ninth Circuit

If Timothy Sherman's trial had taken place in Georgia, New York, or Pennsylvania, rather than in Maryland, his conviction would have been reversed in state court on federal constitutional grounds. Two of those jurisdictions, Georgia and New York, view the Sixth Amendment rights implicated by an unauthorized juror site visit in a criminal case to be so fundamental — and the inherent danger of prejudice to be so great — that reversal is automatic whenever such a visit occurs, regardless of whether physical aspects of the crime scene have played prominently in the contentions of the parties at trial.[17] Pennsylvania limits the rule of per se reversal to situations in which "significant issues were raised at trial concerning the physical aspects of the areas visited by the juror" (*Commonwealth* v. *Price*, 463 Pa. 200, 203-204, 344 A.2d 493, 494 (1975)), but even that narrower test also clearly would encompass Sherman's case and require reversal of his conviction.

Moreover, as Judge Murnaghan observed (App., *infra*, 25a-26a), the Ninth Circuit's recent decision in *United States* v. *Noushfar*, 78 F.3d 1442 (1996), strongly suggests that it, too, would treat Sherman's claim of error as structural. In that case, the judge permitted jurors to take into the jury room during

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[17] See *Alford* v. *Sventek*, 53 N.Y.2d 743, 745, 439 N.Y.S.2d 339, 341, 421 N.E.2d 831, 833 (1981) ("we have held that an unauthorized visit to the scene of the crime is inherently prejudicial in a criminal matter"); *Watkins* v. *State*, 237 Ga. 678, 685, 229 S.E.2d 465, 470-471 (1976) (juror site visit "requires a reversal"); *People* v. *DeLucia*, 20 N.Y.2d 275, 279, 282 N.Y.S.2d 526, 530, 229 N.E.2d 211, 214 (1967) ("Such a visit, in and of itself, constitutes inherent prejudice to the defendants.").

deliberations a number of tape recordings that had never been played in open court. The Ninth Circuit stated that such an error "undermines one of the most fundamental tenets of our justice system: that a defendant's conviction may be based only on the evidence presented during trial." *Id.* at 1445. The Ninth Circuit compared the judge's decision to "allowing a new witness to testify privately, without cross-examination, to the jury during its deliberations." *Ibid.* Referring to the test for structural error announced in *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), the court of appeals held that the error violated "the basic framework of the trial system, which requires that evidence be presented and tested in front of the jury, judge and defendant," and emphasized that it "defies meaningful review * * * because the impact of the error on the jury's performance of its duties cannot be reviewed." 78 F.3d at 1445 (internal quotation marks omitted). The nature of the error in Sherman's case is functionally indistinguishable from — and if anything more serious than — that which occurred in *Noushfar*, and would undoubtedly lead the Ninth Circuit to the same conclusion.

The conflict among these cases is direct and irreconcilable: the Fourth Circuit has taken the position that, no matter what the circumstances, unauthorized juror site visits can never be considered structural error; New York and Georgia courts have taken an opposite approach, treating all juror site visits as structural error; Pennsylvania's highest court and the dissents below have taken a third approach that considers the relationship between the site visit and the issues at trial before concluding whether an error of constitutional dimension has occurred at all but treats such an error, once found, as structural; and *Noushfar* indicates that the Ninth Circuit would apply some variation of structural-error analysis.[18]

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[18] The approach of setting a threshold of seriousness to distinguish constitutional errors from similar but trivial incidents, but then treating all constitutional errors of a certain genre as structural, finds support in this Court's cases. Compare *Geders* v. *United States*, 425 U.S. 80 (1976) (order not to consult with counsel overnight is constitutional error that always requires reversal), with *Perry* v. *Leeke*, 488 U.S. 272 (1989) (automatic-reversal rule for constitutional errors of this sort remains intact, but order not to consult during a 15-minute recess is not constitutional error at all).

It is undeniable that juror site visits present recurring problems in criminal cases. See Annotation, *Unauthorized View of Premises by Juror or Jury in Criminal Case as Ground for Reversal, New Trial, or Mistrial*, 50 A.L.R.4th 995 (1986). It is equally undeniable that such visits present issues of federal constitutional law, as all the federal judges below acknowledged, and that the courts are in disarray as to how to approach and resolve those issues. A grant of certiorari in this case can bring a much-needed dose of coherence to this body of criminal law, and can put an end to an intolerable situation where a defendant's fundamental rights depend on the State in which he is tried.

B. The Court of Appeals Misapprehended and Misapplied the Structural-Error Test Established by This Court's Precedents

In *Chapman* v. *California*, 386 U.S. 18, 23 (1967), this Court stated that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." What separates these errors from the large majority of errors that can be treated as harmless is that they are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. Moreover, they represent those "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). By contrast, those errors that can be treated as harmless are best described as "trial errors" — errors that "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-308.

In one of its most recent discussions regarding structural error, this Court in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), held that the giving of a constitutionally deficient reasonable doubt instruction to the jury automatically required reversal of the conviction. The Court began its analysis by stating what it deemed "self-evident," namely that trial by jury in the constitutional sense necessarily implied a jury verdict of guilty beyond a reasonable

doubt. It then noted that the premise of any harmless-error review is that there is a "jury verdict within the meaning of the Sixth Amendment" that can be analyzed by a reviewing court. But if that premise is absent — as when a jury is improperly instructed on reasonable doubt — there is "no *object* * * * upon which harmless-error scrutiny can operate." *Id.* at 280. In such circumstances,

> The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action * * *; it requires an actual jury finding of guilty.

Ibid. (citation omitted). The Court added that the Sixth Amendment right implicated in that case was a "'basic protection' whose precise effects are unmeasurable," and that deprivation of that right has "consequences that are necessarily unquantifiable and indeterminate, [and] unquestionably qualifies as 'structural error.'" *Id.* at 281-282.

Not all Sixth Amendment errors are structural, of course. See *Satterwhite* v. *Texas*, 486 U.S. 249 (1988).[19] But "Sixth Amendment violations that pervade the entire proceeding fall within this category." *Id.* at 256. Serious breaches of the principle that a conviction be based solely on evidence presented at trial are such "perva[sive]" errors because that principle is so fundamental and because the effect of the *non*-admitted evidence is so difficult to gauge. The requirement that a conviction be based only on evidence admitted at trial "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner* v. *Louisiana*, 379 U.S. 466, 472 (1965); see also *id.* at 472-473 ("In the constitutional sense, trial by jury in a criminal case

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[19] Although this Court's decision is *Satterwhite*, 486 U.S. at 257, "permits harmless error analysis * * * where the evil caused by a Sixth Amendment violation is limited to the erroneous admission [or exclusion] of particular evidence at trial," it cannot be ignored that most, if not all, of the errors that this Court has classified as "structural" relate to the denial of some right based on the Sixth Amendment.

necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."). Thus, just as there can be "no jury verdict within the meaning of the Sixth Amendment" when a jury receives a deficient reasonable doubt instruction (*Sullivan*), there likewise can be no constitutionally sufficient jury verdict when significant "evidence developed" against the defendant emanates from outside the courtroom.

When this type of error does occur, "[a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done [without the extrinsic evidence]. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281 (quoting *Rose*, 478 U.S. at 578). See also App., *infra*, 32a (Motz, J., dissenting in part) ("A court cannot conclude anything about the jury's actual finding of guilt, because that finding was based to some unknown extent on evidence that was *never* presented at trial."). Thus, as in *Sullivan*, the error in Sherman's case is most appropriately viewed as structural.

Juror Miller's site visit also falls squarely within the definitions of structural error found within other decisions of this Court. The transformation of a juror into a detective surely is a "defect[ ] in the constitution of the trial mechanism" that fundamentally alters "the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309-310. Unsupervised gathering of evidence by a juror represents a breakdown of the adversarial system of justice and a corruption of the jury's role as disinterested factfinder, thus severely compromising both the reliability and the integrity of the trial process. Moreover, a criminal defendant's Sixth Amendment right to be confronted with the evidence against him is a "'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its [truth-seeking] function." *Sullivan*, 508 U.S. at 281. And this type of error, if undisclosed until after a verdict, necessarily permeates the whole trial because it affects the juror's consideration of the evidence actually presented at trial in a truly limitless and inherently unknowable number of ways.

At the same time, the error in Sherman's trial is very much *unlike* the errors that this Court has classified as "trial errors."

The juror site visit obviously did not occur "during the presentation of the case to the jury" (*Fulminante*, 499 U.S. at 307), and the juror's "findings" certainly are not reflected in the trial record. Even more problematic, the error "defies analysis by harmless error standards" because no one except the juror — who generally cannot be questioned about such matters, cf. Fed. R. Evid. 606(b) — knows precisely what that "extrinsic evidence" is, since it consists solely of mental impressions gained from the unauthorized viewing. Thus, the error has "consequences that are necessarily unquantifiable and indeterminate," and that cannot be "quantitatively assessed in the context of other evidence presented." *Sullivan*, 508 U.S. at 281-282 (internal quotation marks omitted). Under this Court's prior decisions, such an error "unquestionably qualifies as 'structural error.'" *Ibid.*

Rather than adhere to the language and reasoning of this Court's precedents, the court below engaged in a structural-error analysis that finds no precedential support whatever. Its first analytical step assures a mistaken result by collapsing the distinct structural- and harmless-error analyses into one overall test of whether the defendant received a "fair" trial. In the majority's view, if an error could be non-prejudicial in some hypothetical situation, then it cannot be classified as a structural error because to do so would result in the "reversal of criminal convictions obtained pursuant to a fair trial." As this quotation illustrates, the majority's understanding of what constitutes a "fair trial" depends exclusively on its view of the harmlessness of the error.

But the majority's analysis is clearly inverted: "fairness" is not dependent on the harmlessness of an error; to the contrary, principles of fairness often require that convictions be reversed even if the error cannot be shown to cause prejudice in a specific context. For example, in *Turner* v. *Louisiana*, *supra*, this Court reversed the conviction without any prejudice analysis, over the objection of the dissent, because of the fundamental nature of the Sixth Amendment error. Likewise, in *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927), this Court held that the denial of an impartial judge required automatic reversal, even though the evidence showed that the defendant was "clearly" guilty, and even though he was fined the "minimum amount" authorized by statute. As noted by Judge Motz in her partial dissent (App., *infra*, 33a), this Court held in

Waller v. *Georgia*, 467 U.S. 39 (1984), that the denial of a right to a public trial (also based on the Sixth Amendment) is structural error "because it renders the entire process unfair, not because such an error can never be 'harmless' in terms of its impact on the jury's verdict." And no one could seriously contend that *every* denial of the right to consult with counsel overnight results in an unreliable verdict, yet such a denial requires automatic reversal. See *Geders* v. *United States*, *supra*; *Perry* v. *Leeke*, *supra*.

This Court's cases make clear that the hallmark of a structural error is not, as the majority assumed, that the error can never *be* harmless in a particular situation, but rather is that the error creates such inherent uncertainty about the fairness of the trial that the Court is unwilling to permit it to be "*treated as* harmless." *Chapman*, 386 U.S. at 23 (emphasis added); see also *Satterwhite*, 486 U.S. at 256 ("Some constitutional violations * * * by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless."). In *Riggins* v. *Nevada*, 504 U.S. 127, 137 (1992), for example, the Court reversed a criminal conviction without engaging in harmless-error analysis because "the precise consequences" of the constitutional error — the forced medication of the defendant for trial — could not "be shown from a trial transcript." In *Satterwhite*, the Court observed that Sixth Amendment violations whose consequences "cannot be discerned from the record" can never be considered harmless. 486 U.S. at 256. And, as noted above, *Sullivan* rejected harmless-error review of an error whose "precise effects are unmeasurable," and which had "consequences that are necessarily unquantifiable and indeterminate." 508 U.S. at 281-282. These cases exemplify the Court's focus on *uncertainty* as the defining characteristic of structural errors. Nevertheless, the en banc majority expressly stated its contrary view that, "before a court adds a new error to the list of structural errors * * *, the court must be *certain* that the error's presence would render *every* such trial unfair." App., *infra*, 6a (first emphasis added, second in original). Such an approach is simply inconsistent with this Court's decisions.

But the majority's analytical difficulties do not end here. Armed with its faulty premise, the majority then broadened Sherman's structural claim so that it could not satisfy the court's test, declaring that, because juror site visits can encompass many differ-

ent scenarios, "[i]t makes no sense * * * to apply to this wide range of circumstances a single rule of automatic reversal." App., *infra*, 9a. But Sherman never argued that *all* juror site visits were structural error; rather, he expressly limited his claim to those situations in which the physical aspects of the site inspected were materially in dispute and had a potentially significant bearing on guilt or innocence. Petitioner argued that trivial juror site visits should not be considered constitutional error at all — an approach similar to the one this Court has taken with regard to restrictions imposed on a defendant's communications with his or her attorney. See note 18, *supra*. As one of the dissents noted (App., *infra*, 34a), Sherman's approach "has much to recommend it" because it "protects the fundamental right involved here, yet avoids trivialization of the structural-error inquiry." The majority opinion, however, never addressed this specific claim. Instead, "the majority * * * created and then defeated a straw man." App., *infra*, 33a.

Finally, the court of appeals turned to a structural-error analysis that bears some resemblance to the one dictated by this Court's cases, but then seriously misapplied its principles. In response to Sherman's argument that a juror site visit defied typical harmless-error analysis, the majority relied on a series of inapposite cases standing for the undisputed proposition that Sixth Amendment violations, even those involving juror misconduct and extrinsic influences, can be subject to harmlessness review in certain circumstances. But the majority overlooked the critical distinctions between many of those cases and Sherman's: (1) a juror site visit to clarify disputed evidence presented at trial truly develops additional "evidence" against the defendant in the relevant constitutional sense, whereas the introduction into a jury room of a dictionary, or some other material that has no relationship to the facts of the case, does not; and, (2) unlike the outside-materials or erroneous-instruction cases on which the majority relied, a site-visit case does not allow a reviewing court ever to know the precise nature of the extrinsic or erroneously considered evidence because it consists solely of the juror's own mental impressions. Due to the "dearth of information" regarding this extrinsic evidence, harmless-error analysis would require appellate courts to "do the impossible: to reconstruct what went on in jury deliberations through nothing more than

post-trial hearings and sheer speculation." *United States* v. *Annigoni*, 1996 WL 536490 at *14 (9th Cir. Sept. 23, 1996) (en banc).

Thus, while the majority correctly stated that a reviewing court can inquire into the "nature and extent of the juror's *activity*" (App., *infra*, 8a-9a (emphasis added)), its view that a court also "can consider whether the juror learned information that was merely cumulative of other evidence or whether he unearthed new information not previously presented to the jury" is wrong. If the majority's use of the word "consider" means to ask the juror what he learned from his investigation and how it related to other evidence admitted at trial, most States' rules of evidence, like Federal Rule of Evidence 606(b), would prevent any such inquiry;[20] if, on the other hand, the majority means that a court can speculate about what a juror might have learned and its impact on the verdict, then its conclusion is contrary to this Court's decisions prohibiting such unbridled speculation about the basis on which a jury *actually rested* its verdict. *Sullivan* v. *Louisiana*, *supra*.

Thus, the court of appeals not only placed itself in conflict with other courts, but also seriously misunderstood and distorted the proper structural-error inquiry. The Court should grant certiorari to clarify that inquiry, resolve the conflict, and correct the Fourth Circuit's error.[21]

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[20] For example, at the new trial hearing in Sherman's case, the State objected to, and the trial judge prohibited, the precise inquiry that the majority opinion below envisions — an effort to determine whether juror Miller learned new or simply cumulative information. C.A. App. 241. The court allowed some inquiry into what juror Miller *did*, but allowed no inquiry into his thought processes, as would be necessary to determine whether *he* believed he learned anything new.

[21] Even if the Fourth Circuit were correct in classifying this error as non-structural, it does not follow automatically that harmless-error analysis is possible or even appropriate in this case. As the en banc Ninth Circuit recently concluded, there is no "strict dichotomy" between structural and trial error, and even some non-structural errors should result automatically in reversal. *United States* v. *Annigoni*, 1996 WL 536490 at *13 (Sept. 23, 1996) ("Although we conclude that the [error] is not amenable to harmless-error analysis, we need not decide whether such error rises to the level of structural error.").

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE SERIOUS DISAGREEMENT IN THE LOWER COURTS CONCERNING THE NATURE OF HARMLESS-ERROR ANALYSIS, AND BECAUSE JUROR MILLER'S CRIME SCENE INSPECTION CANNOT BE DEEMED HARMLESS UNDER ANY STANDARD

A. The Court of Appeals' Decision to Apply the More Deferential *Brecht-Kotteakos* Standard Rather Than *Chapman* Is Erroneous and in Direct Conflict with Other Federal Courts

Because *no court* has ever applied the *Chapman* harmless-error standard to his case, Sherman argued below that he is entitled to have the habeas court apply that standard. It is undisputed that, had his case arisen in the Eighth Circuit, the *Chapman* standard would have been applied in these circumstances. See App., *infra*, 10a-11a; pp. 25-26, *infra*. But the Fourth Circuit noted that "at least three other circuits have rejected the Eighth Circuit's reasoning" (App., *infra*, 11a) and added itself to the list, thus deepening an acknowledged conflict.

In *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), this Court had to "decide whether the same harmless-error standard that the state courts *applied* on direct review of petitioner's *Doyle* claim also applies in this habeas proceeding." *Id.* at 635-636 (emphasis added). Answering that question in the negative, the Court twice emphasized that it was the sixth court to address whether the error was harmless, and that an appropriate level of respect for state court harmlessness findings is warranted on habeas review:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, *it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review.*

Id. at 636 (citations omitted) (emphasis added). This passage reflects the Court's strong belief in state courts' ability to render conscientious, accurate constitutional interpretations, and its historic

concern for upholding principles of federalism and comity. But when the state courts fail to identify constitutional error or engage in harmlessness analysis on direct review, the underlying rationale for the holding in *Brecht* no longer exists. In such situations, federal habeas courts must do what the state courts failed to do.

This case is a perfect example of the type of habeas case to which *Brecht* should *not* apply. On direct review of Sherman's claim of error, the state courts never even acknowledged the constitutional nature of petitioner's claim, and thus never applied *any* harmless-error analysis (let alone the demanding test that "*Chapman* requires state courts to engage in on direct review"). Thus, despite the presence of a serious constitutional error infecting Sherman's trial, the State was never required to defend its tainted verdict by proving the error harmless beyond a reasonable doubt. To the contrary, as noted at p. 8, *supra*, the state courts imposed a burden of proving *actual prejudice* on *Sherman* — a difficult, if not impossible, task in the case of a juror site visit because of the restrictions imposed on questioning jurors.

Nevertheless, the court of appeals below, interpreting *Brecht* broadly, held that the less onerous *Brecht-Kotteakos* harmless-error standard applied to review of the Sixth Amendment violation in Sherman's trial; indeed, the court emphasized that it would apply *Brecht* in all collateral proceedings without exception. App., *infra*, 12a. In defense of its holding, the court asserted (remarkably) that Sherman had received "full consideration of his claim by the Maryland courts," and, alluding to language from *Brecht*, that the district court was the "fifth court *asked to assess* the effect of juror Miller's site visit; we are the sixth." App., *infra*, 11a (emphasis added). But in *Brecht*, five other courts (three of them state courts) not only had been "asked to assess" the effect of the error, but also *actually did so* applying federal constitutional standards, and *that* was this Court's point. The fact that Timothy Sherman *asked* various courts, in vain, to give him his constitutional due is hardly a sufficient reason for the Fourth Circuit not to have done so.

The court also stated that Sherman's interpretation of *Brecht* would "rob the decision of any general significance" (*ibid.* (quoting *Tyson* v. *Trigg*, 50 F.3d 436, 446 (7th Cir. 1995), cert. denied, 116 S. Ct. 697 (1996))) and would require state courts to "use particular language in considering claims presented in their courts."

App., *infra*, 12a. But the first of those two statements begs the question whether this Court ever meant for the *Brecht* rule to be of "general significance" in habeas cases in which there were no state-court findings of harmlessness under the *Chapman* standard. And the latter statement is simply a red herring: Sherman has never suggested that the Constitution requires state courts to use *Chapman*-like *language* when reviewing constitutional errors; but the Constitution certainly does require state courts to apply a *Chapman*-like *review* to such claims. *Brecht*, 507 U.S. at 636.

In reaching its decision, the majority acknowledged that the federal circuits are split on this issue: although the Seventh Circuit,[22] a divided panel of the Eleventh Circuit,[23] and the Tenth Circuit agree with its view,[24] the Eighth Circuit has taken — and continues to take — a contrary position.[25] And a federal district court in yet another circuit has issued a thorough and persuasive opinion siding with the Eighth Circuit. In *Lyons* v. *Johnson*, 912 F. Supp. 679 (S.D.N.Y. 1996), Judge Kimba Wood reviewed *Brecht* and the conflicting case law in this area, and determined that *Brecht*'s comity concerns "are far more strongly implicated if federal courts choose to repeat *Chapman* analyses even when state courts have already conducted them, than if federal courts choose to perform *Chapman* analyses that state courts have not performed." *Id.* at 689. Therefore, "federal courts should, under *Brecht*, respectfully defer to state courts' analyses of the harmless-

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[22] *Tyson* v. *Trigg*, 50 F.3d 436 (7th Cir. 1995), cert. denied, 116 S. Ct. 697 (1996).

[23] *Horsley* v. *Alabama*, 45 F.3d 1486 (11th Cir.), cert. denied, 116 S. Ct. 410 (1995).

[24] See *Castro* v. *Oklahoma*, 71 F.3d 1502, 1516 n.14 (10th Cir. 1995); *Gonzales* v. *Shanks*, 86 F.3d 1166 (10th Cir. June 3, 1996) (Table), 1996 WL 290279 (interpreting Tenth Circuit law in conflict with the Eighth).

[25] *Fields* v. *Leapley*, 30 F.3d 986 (8th Cir. 1994); *Starr* v. *Lockhart*, 23 F.3d 1280, 1292 (8th Cir.), cert. denied, 115 S. Ct. 499 (1994); *Orndorff* v. *Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), cert. denied, 114 S. Ct. 1631 (1994).

ness of constitutional error — but where no prior state court *Chapman* holding exists, there is nothing to which to defer." *Ibid.*[26]

Because the court below erroneously deferred to non-existent state court harmlessness findings, and in light of the recurring conflicts among federal courts, the Court should grant certiorari.

B. The Court of Appeals Misinterpreted This Court's Harmless-Error Jurisprudence by Focusing on the Sufficiency of the Untainted Evidence Rather Than the Potential Impact of the Site Visit on the Verdict

When it actually applied the *Brecht-Kotteakos* standard to the facts of this case, the majority below thoroughly misunderstood that standard — in a manner that is symptomatic of serious confusion in the lower courts deserving this Court's attention. The majority dismissed Sherman's claims *not* by analyzing the likely impact on the jury of erroneously gained information concerning a key disputed issue at trial, but rather by looking to other, untainted evidence "from which the jury *could* conclude that Sherman hid the weapon in the tree." App., *infra*, 15a (emphasis added). It is a huge leap of logic to go from the proposition — critical to a *sufficiency* analysis — that the jury "could" have concluded that Sherman hid the weapon in the tree, based on "other evidence" presented at trial, to the very distinct proposition that juror's Miller site visit was *harmless*. The jury certainly could have discounted the other evidence linking Sherman to the tree for the reasons advanced by petitioner at trial or for other reasons not apparent from the face of the record. Precisely to avoid such a sufficiency-based analysis, which grants the prosecution the benefit of all reasonable inferences from properly admitted evidence, harmlessness review requires an affirmative determination under *some* appropriate standard that the evidence erroneously before the jury *did not* affect the verdict. See *Satterwhite*, 486 U.S. at 258 ("The question, however, is not whether the legally admitted evidence was sufficient to support [the conviction], which we assume it was, but rather, whether the State has proved * * * that the error complained of did not contribute to the verdict obtained.") (internal quotation marks omitted); see also

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[26] See also *Rickman* v. *Dutton*, 864 F. Supp. 686 (M.D.Tenn. 1994) (following Eighth Circuit rule).

Kotteakos v. *United States*, 328 U.S. 750, 765 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."); *O'Neal* v. *McAninch*, 115 S. Ct. 992 (1995). That simply cannot be said in this case, and the majority's sufficiency-oriented statements about what the jury *could* have done betray the infirmity of its analysis.

In applying harmlessness analysis, under any standard, it is critical to understand — as the majority below did not — that the spectrum of criminal cases includes a middle range where an error-free conviction would have to be sustained but a tainted conviction cannot be sustained. At one end of the spectrum are cases in which the untainted evidence of guilt simply is insufficient to sustain a conviction, and therefore the conviction must be reversed outright. *Kotteakos*, 328 U.S. at 763-764 & n.18. At the other end are cases in which the untainted evidence of guilt is so "overwhelming" or weighty that no reasonable jury could have rendered an acquittal, and thus the errors cannot be considered harmful. See, *e.g.*, *Harrington* v. *California*, 395 U.S. 250, 254 (1969). At either of these two ends of the spectrum, a searching inquiry into whether the verdict was swayed by the error is unnecessary because the untainted evidence compels a conclusion one way or the other. In the middle of the spectrum, however, are those cases — such as this one — in which the independent evidence may be enough to sustain a conviction, but also is sufficiently circumstantial or conflicting that a reasonable jury could have reached a not-guilty verdict. In this latter category of cases, the harmlessness inquiry cannot look solely to the untainted, inculpatory evidence and ask whether a reasonable jury could have (or even would have) convicted based on that evidence. Rather, a reviewing court must judge an error's effect by its relationship to the untainted evidence and the central issues in the case, or in other words, by "pondering all that happened without stripping the erroneous action from the whole." *Kotteakos*, 328 U.S. at 764-765.

This Court's precedents firmly require reversal of convictions in that middle category, where a judge may think the defendant guilty but jurors untainted by the error could have reached an opposite conclusion. A tainted verdict should stand only "[i]f, when all is said and done, the conviction is sure that the error did

not influence the jury, or had but very slight effect." *Kotteakos*, 328 U.S. at 764. The critical question is "the impact of the thing done wrong on the minds of other men, not on one's own," and courts must "judge others' reactions not by [their] own, but with allowance for how others might react." *Ibid.* And this Court has stated that "[t]o say that an error did not contribute to the verdict is * * * to find that error unimportant in relation to everything else the jury considered on the issue in question." *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991).

The majority thus seriously went astray when it stated that the "powerful array of evidence" against Sherman suggested that his claim of error "is nothing more than a roundabout way for Sherman to challenge the sufficiency of the evidence against him." App., *infra*, 15a. Sherman did not challenge the sufficiency of the evidence. He correctly asserted — consistent with this Court's precedents — that the evidence was sufficiently conflicting that reasonable jurors could (and in fact did, see note 9, *supra*) harbor doubts about his guilt and vote for acquittal in an error-free trial and that he therefore was entitled to habeas relief.

The majority compounded its error by misunderstanding what constitutes "cumulative" evidence for purposes of harmlessness review. According to the court, any potential information gained from juror Miler's site visit was "cumulative" of properly admitted evidence consisting of "photographs showing that Sherman had an opportunity to hide the weapon in the tree," and testimony that Sherman had used the tree as a hiding spot for a different item on one previous occasion. App., *infra*, 14a.[27] But neither of those two pieces of evidence dealt with the critical questions whether someone of Sherman's size could have forced the gun into the thick, sappy tree in the manner in which it was found, or could

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[27] Because of the sparsity of the record developed at the new trial hearing, the exact details of juror Miller's site visit remain unknown. Despite the lack of details, the majority confidently asserted that whatever information was or could have been gained by juror Miller was merely "cumulative." As Judge Motz stated in her dissent, such an approach leads inevitably to the conclusion that *no* juror site visit can ever be deemed harmful since some evidence about the crime scene will always have been introduced at trial. App., *infra*, 40a-41a.

have done so without displaying some outward sign of his efforts, such as scratches or pine needles or residue. Because the site visit could have answered these questions in juror Miller's mind — a real possibility — the inspection cannot be merely "cumulative" of the other evidence presented at trial. See *Fulminante*, 499 U.S. at 296-299 (first confession not cumulative of second confession because it contained different details and jury "might have believed that the two confessions reinforced and corroborated each other").

Sherman submits that he is clearly entitled to habeas relief because it is impossible for any reviewing court to conclude confidently that juror Miller's independent inspection of key, disputed physical aspects of the crime scene that directly bear on his claims of innocence did not affect the verdict. See *O'Neal* v. *McAninch*, *supra*. Indeed, as both dissents stated, the record reveals that juror Miller went to view the tree precisely to resolve his doubts about the key evidence in the case against Sherman.[28] To hold, as the majority did, that deliberate evidence-gathering to fill pivotal holes in the State's case is harmless because it is merely "cumulative" of other evidence presented at trial is nothing short of astonishing.

The Fourth Circuit, however, is not alone in misinterpreting harmless-error analysis. Chief Judge Edwards of the D.C. Circuit recently lectured about the enormous confusion in the federal courts regarding the role of untainted evidence in a harmlessness inquiry, and criticized the tendency of judges to "apply the doctrine by assessing whether the evidence adduced at trial * * * appears sufficient to support a guilty verdict." *To Err is Human, But Not Always Harmless: When Should Legal Error be Tolerated?*, 70 N.Y.U.L. Rev. 1167, 1187 (1995). As Chief Judge Edwards noted, this confusion reigns in part because this Court has, over the years, suggested that analyzing the independent evidence of guilt is an alternative or acceptable method of gauging harmlessness, without making clear that such an analysis is only appropriate where the untainted evidence compels a certain result. *Id.* at 1188.

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[28] Of all the courts to consider juror Miller's site visit, the en banc majority was the only one that suggested agreement with the State's characterization of the site visit as motivated by "idle curiosity."

The guilt-based approach to harmlessness, epitomized by the court below and all too often followed by courts across the country, is inconsistent with precedents such as *Satterwhite*, *Fulminante*, *Sullivan*, and *O'Neal*.[29] Because "it is the rare case in which a constitutional violation will not be subject to harmless-error analysis" (*Sullivan*, 508 U.S. at 282 (Rehnquist, C.J., concurring)), the proper application of that doctrine is vitally important to the administration of criminal law. The Court should grant certiorari in this case to clarify the harmlessness inquiry and reverse the Fourth Circuit's incorrect application of this critical doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
Counsel of Record
ROY T. ENGLERT, JR.
THOMAS DILENGE
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

STUART J. ROBINSON
24 E. Pennsylvania Avenue
Bel Air, Maryland 21024
(410) 879-5050

Counsel for Petitioner

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[29] Chief Judge Edwards relied on a survey of post-1992 cases revealing that courts conducted a guilt-based harmless-error analysis twice as often as an "effect on the verdict" approach, and that the choice of analysis resulted in actual differences in outcome. 70 N.Y.U.L. Rev. at 1187 n.81. That is surely true in this case, where the panel majority held the error non-harmless by focusing on its relationship to disputed issues and the "conflicting" evidence of guilt at trial (App., *infra*, 44a), while the en banc majority conflated the harmlessness inquiry with a *sufficiency* inquiry and thereby ruled against Sherman.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 94-6831

TIMOTHY SCOTT SHERMAN, Petitioner-Appellant,

v.

WILLIAM L. SMITH, Warden,
Maryland House of Correction-Annex; JOHN JOSEPH CURRAN, JR., Attorney General for the State of Maryland,
Respondents-Appellees.

Argued April 2, 1996.

Decided July 17, 1996.

ARGUED: Andrew Lewis Frey, Mayer, Brown & Platt, Washington, D.C., for Appellant. Ann Norman Bosse, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, Baltimore, Maryland, for Appellees. ON BRIEF: Roy T. Englert, Jr., James G. Duncan, Mayer, Brown & Platt, Washington, D.C.; Stuart J. Robinson, Bel Air, Maryland, for Appellant. J. Joseph Curran, Jr., Attorney General of Maryland, Criminal Appeals Division, Office of the Attorney General, Baltimore, Maryland, for Appellees.

Before WILKINSON, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges, sitting en banc.

Affirmed by published opinion. Chief Judge WILKINSON wrote the majority opinion, in which Judges RUSSELL, WIDENER, HALL, WILKINS, NIEMEYER, HAMILTON, LUTTIG, and WILLIAMS joined. Judge MURNAGHAN wrote a dissenting opinion, in which Judges ERVIN and MICHAEL joined. Judge MOTZ wrote a concurring and dissenting opinion.

OPINION

WILKINSON, Chief Judge:

We granted en banc review in this case to consider whether the district court properly denied Timothy Sherman's petition for a writ of habeas corpus. In 1988, a state jury convicted Sherman of killing his mother and adopted father, Ann and Stevenson Sherman, and sentenced him to two consecutive terms of life. Sherman asks this court to overturn his conviction due to one juror's unauthorized visit to the crime scene during the course of his trial. Because we find that the juror's excursion was not a structural error requiring a per se reversal of Sherman's conviction, and that the effect of the juror's visit was harmless, we affirm.

I.

Early in the morning of October 12, 1987, Ann and Stevenson Sherman were shot to death as they slept. Each died from a fatal shotgun blast. When police arrived, Timothy Sherman, Ann and Stevenson's eighteen-year-old son, was in the house with his maternal grandfather, William Gibson. Timothy told the officers that he had heard gun shots and then had run to his grandfather's nearby home. The two of them returned to the Sherman house, where Gibson summoned the police.

Timothy was in his parents' house when the murders occurred. The house, which was equipped with an extensive alarm system, revealed no signs of forced entry or theft. The burglar alarm system was turned off. Police officers found two expended Remington 12-gauge shotgun shells in the hallway outside Ann and Stevenson's bedroom. In Timothy's bedroom, officers uncovered a box of Remington 12-gauge shotgun shells stuffed under the mattress of his bed. The box held five shells, and two were missing; the three remaining shells matched the expended shells found outside the Shermans' bedroom.

Police deputies also found a 12-gauge shotgun, which belonged to the Shermans, lodged in a pine tree near Gibson's house. The gun was pushed inside the branches of the tree, with the barrel pointing downward toward the trunk of the tree and the butt pointing upward. Tests confirmed that the two shells that police found in the hallway outside the Shermans' bedroom had been fired from this shotgun. Three latent fingerprints matching those of

Timothy Sherman were also found on the weapon, including a fingerprint above the trigger assembly.

Timothy Sherman was charged and tried for the murder of his parents. At trial, the state relied heavily on the evidence gathered at the crime scene. The defense emphasized that Sherman had no apparent motive for the murders, no gunshot residue on his hands or clothing, and no pine needles or sap on his clothing even though he allegedly hid the weapon in the tree. After a lengthy trial, the jury convicted Sherman of two counts of first-degree murder.

Sherman thereafter moved for a new trial based, in part, on allegations of juror misconduct during the course of the trial. Specifically, he alleged that one of the jurors, Blane Miller, had made an unauthorized visit to the crime scene on the second or third day of the trial. Sherman argued that he was entitled to a new trial because the juror's visit infringed his Sixth Amendment rights.

The trial judge held an evidentiary hearing on the motion for a new trial. At the hearing, juror Miller testified that one evening two or three days into the trial he and his wife drove to the crime scene, which was located in a development called Gibson Manor. As he explained, he "went to the Sherman house and then[ ] drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." Miller confirmed that he saw the tree and the house. He visited the site, he said, "so I could see the tree that was so much in question."

At the close of the hearing, the trial judge rejected the motion for a new trial. Sherman appealed this ruling, and alleged nine other assignments of error. The Maryland Court of Special Appeals, however, declined to grant relief. The Maryland Court of Appeals and the United States Supreme Court declined to review Sherman's conviction. *Sherman* v. *Maryland*, 498 U.S. 950, 111 S.Ct. 370, 112 L.Ed.2d 333 (1990).

Sherman then filed a federal habeas petition alleging that the juror's site visit warranted reversal of his conviction. In August, 1992, the district court denied his petition. A panel of this court vacated the district court's judgment and remanded to the district court for a de novo review of the record to determine "the nature of the error" and whether it "influenced the jury's deliberations."

Sherman v. *Smith*, 8 F.3d 820 (Table), No. 92-6947, slip op. at 7 (4th Cir. 1993) (per curiam).

On remand, following a de novo review of the record, the district court again denied the petition, and Sherman filed the instant appeal. A panel of this court reversed and granted Sherman's petition. 70 F.3d 1263 (Table), No. 94-6831 (4th Cir. 1995) (per curiam). The court then voted to hear the case en banc.

II.

Sherman contends that juror Miller's unsupervised visit to the crime scene violated his Sixth Amendment rights to confront and cross-examine witnesses against him and to be judged by an impartial jury. We shall assume for purposes of argument that juror Miller's site visit amounted to a constitutional violation of Sherman's rights. This error, Sherman claims, constituted a structural error requiring automatic reversal of his conviction, rather than a trial error which can be "quantitatively assessed in the context of other evidence presented" in order to determine whether its occurrence was harmless. *Arizona* v. *Fulminante*, 499 U.S. 279, 308 (1991). We disagree with Sherman's claim. An unsupervised juror site visit does not constitute structural error, but rather is subject to harmless error analysis.

A.

Criminal defendants in this country are entitled to a fair, but not a perfect trial. "[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial," and the Constitution does not demand one. *United States* v. *Hasting*, 461 U.S. 499, 508 (1983). This focus on fairness, rather than on perfection, protects society from individuals who have been duly and fairly convicted of crimes, thereby promoting "public respect for the criminal process." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986).

With this in mind, the Supreme Court has recognized that most errors do not automatically render a trial unfair and thus, can be harmless. *Fulminante*, 499 U.S. at 306-07. *Fulminante* enumerated the wide variety of constitutional errors subject to harmless error analysis. They include improper admission of an involuntary confession, *id.* at 306-12; overbroad jury instructions

at the sentencing stage of a capital case, *Clemons* v. *Mississippi*, 494 U.S. 738 (1990); improper admission of evidence at the sentencing stage of a capital case, *Satterwhite* v. *Texas*, 486 U.S. 249 (1988); jury instructions containing erroneous conclusive or rebuttable presumptions, *Carella* v. *California*, 491 U.S. 263, 266-67 (1989) (per curiam); *Rose* v. *Clark*, 478 U.S. 570 (1986); erroneous exclusion of a defendant's testimony regarding the circumstances of a confession, *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986); improper restriction on a defendant's right to cross-examine witnesses for bias, *Van Arsdall*, 475 U.S. at 673; denial of a defendant's right to be present at trial, *Rushen* v. *Spain*, 464 U.S. 114, 117-19 and n.2 (1983) (per curiam); improper comment on a defendant's silence at trial, *Hasting*, 461 U.S. at 499; improper prohibition on the provision of a lesser included offense instruction in a capital case, *Hopper* v. *Evans*, 456 U.S. 605 (1982); failure to instruct the jury on the presumption of innocence, *Kentucky* v. *Whorton*, 441 U.S. 786 (1979) (per curiam); improper admission of identification evidence, *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977); erroneous admission of an out-of-court statement of a nontestifying codefendant, *Brown* v. *United States*, 411 U.S. 223 (1973); improper admission of a confession made to an undercover officer, *Milton* v. *Wainwright*, 407 U.S. 371 (1972); admission of evidence obtained in violation of the Fourth Amendment, *Chambers* v. *Maroney*, 399 U.S. 42, 52-3 (1970); and improper denial of counsel at a preliminary hearing, *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970). Indeed, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579; see also *United States* v. *Blevins*, 960 F.2d 1252, 1261-62 (4th Cir. 1992).

The Supreme Court has also recognized that certain structural errors are so severe as to render a trial inherently unfair and thus, should not be subject to harmless error analysis. *Fulminante*, 499 U.S. at 309-10; see, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (the denial of the right to a jury verdict of guilt beyond reasonable doubt); *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984) (the denial of the right of self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (the denial of the right to public

trial); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (the total deprivation of the right to counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (the presence of a biased judge). Unlike other errors, "[t]hese are structural defects in the constitution of the trial mechanism" and "'[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Fulminante*, 499 U.S. at 309-10 (quoting *Rose*, 478 U.S. at 577-787). Structural errors affect the "entire conduct of the trial from beginning to end," and therefore cannot be harmless. *Fulminante*, 499 U.S. at 309.

Correctly applied, harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. Expanding the list of structural errors, however, is not mere legal abstraction. It can also be a dangerous endeavor. There is always the risk that a sometimes-harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk, judges should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby requires the reversal of every criminal conviction in which the error occurs), the court must be certain that the error's presence would render *every* such trial unfair. See *id.* at 310.

Here, Sherman maintains that a juror site visit is so unfair that it must constitute a new addition to the short list of structural errors. But a juror site visit "does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction." *Rose*, 478 U.S. at 579. Unlike the complete denial of counsel and other structural errors, which affect the "entire conduct of the trial from beginning to end," juror site visits can be discrete moments in the course of an otherwise fair trial. *Fulminante*, 499 U.S. at 309. As it cannot be said with any certainty that a juror site visit renders every trial in which it occurs unfair, it would be a reckless undertaking to remove such errors from the rubric of harmless error analysis.

After all, our criminal justice system represents a balance between the rights of accused persons and the need for public safety. This balance is best expressed in the notion of a fair, but

not a perfect, criminal trial. When an error is misclassified as one requiring automatic reversal, the balance is upset, and proceedings that in reality are perfectly fair are discarded in the name of an elusive systemic perfection.

B.

Sherman maintains, however, that unauthorized juror site visits constitute structural error because they "defy" harmless error analysis. That analysis requires a reviewing court to quantitatively assess the effect of the error "in the context of other evidence presented" at trial. *Fulminante*, 499 U.S. at 308. Sherman observes that the rules of evidence prevent examination of the jury's mental impressions formed during the deliberative process. See *Tanner* v. *United States*, 483 U.S. 107, 117 (1987). Without such evidence, he argues, a reviewing court could never determine the effect of a crime scene visit on the jury's verdict.

We disagree. Alleged infringement of Sixth Amendment rights is no exception to the general rule that "most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306. The Supreme Court has "long since rejected the argument that, as a general matter, the Sixth Amendment prohibits the application of harmless-error analysis in determining whether constitutional error had a prejudicial impact on the outcome of a case." *Sullivan*, 508 U.S. at 282-83 (Rehnquist, C.J., concurring).

Sherman's argument is further undercut by the Supreme Court's application of harmless error analysis to claims of juror misconduct and bias, claims that are essentially indistinguishable from those Sherman alleges. In *Smith* v. *Phillips*, 455 U.S. 209 (1982), the Court held that a juror's mid-trial application for employment in the District Attorney's office responsible for prosecuting the defendant did not require automatic reversal of the conviction. As the Court observed, the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation ... [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Id.* at 217. In *Remmer* v. *United States*, 347 U.S. 227 (1954), an outsider apparently offered a juror a bribe in return for a favorable verdict; the trial judge ordered an investigation without disclosing the proffered bribe or

investigation to defense counsel. Even in these circumstances, the Court did not require automatic reversal of the conviction. Instead, it directed the trial court to conduct a hearing to determine the prejudicial impact of the developments. *Id.* at 230. Smith and Remmer thus contemplate the precise inquiry that Sherman characterizes as impossible: discerning the effect of juror misconduct or bias on the verdict without examining the thought processes of the jury.

Following the Supreme Court's lead, this court has repeatedly examined instances of juror misconduct and bias for harmlessness. See *United States* v. *Seeright*, 978 F.2d 842, 849-50 (4th Cir. 1992) (juror's independent investigation of evidence did not require a mistrial when judge excused juror from further service and satisfied himself that other jurors were not affected); *Stockton* v. *Virginia*, 852 F.2d 740, 743-46 (4th Cir. 1988) (jury's exposure to improper third-party contact examined to determine extent of prejudice), cert. denied, 489 U.S. 1071 (1989); *United States* v. *Malloy*, 758 F.2d 979, 982-83 (4th Cir.) (juror's previous service at trial of co-defendant did not require a new trial), cert. denied, 474 U.S. 1009 (1985); *Miller* v. *Harvey*, 566 F.2d 879, 881 (4th Cir. 1977) (jury's improper experiment, in which one juror bit another to observe the resulting bruises, did not violate due process and thus did not require granting a writ of habeas corpus), cert. denied, 439 U.S. 838 (1978). Likewise, other courts have applied harmless error analysis to such claims. See, *e.g.*, *Lawson* v. *Borg*, 60 F.3d 608, 612-13 (9th Cir. 1995) (juror's comments about defendant's reputation for violence subject to harmless error analysis); *United States* v. *De La Vega*, 913 F.2d 861, 869-71 (11th Cir. 1990) (jury foreman's actions of reading a book, showing book to other jurors, and organizing deliberations based on book subject to harmless error analysis), cert. denied, 500 U.S. 916 (1991); *Marino* v. *Vasquez*, 812 F.2d 499, 504-07 (9th Cir. 1987) (juror's out of court experiment, in which she attempted to fire a weapon while holding it in a position consistent with defense's version of shooting, subject to harmless error analysis).

Abundant caselaw thus rejects any special rule of automatic reversal for unauthorized juror site visits. Such visits do not, as Sherman alleges, "defy" harmless error inquiry. In performing that inquiry, a court can look to the nature and extent of the juror's

activity and assess how that activity fit into the context of the evidence presented at trial. See *De La Vega*, 913 F.2d at 870-71. The court can consider whether the juror learned information that was merely cumulative of other evidence or whether he unearthed new information not previously presented to the jury. See *Farese* v. *United States*, 428 F.2d 178 (5th Cir. 1970) (jury finds substantial sum of money in shirt admitted into evidence; existence of money unknown to court or parties). In short, juror site visits may be casual or they may be intensive. They may reveal much or they may uncover little. It makes no sense, however, to apply to this wide range of circumstances a single rule of automatic reversal. Rather, an assessment of the degrees of potential prejudice from a site visit is ideally suited for harmless error inquiry.

The inquiry here is no more speculative than consideration of other errors that are examined for harmlessness. All harmless error analysis involves some level of indeterminacy because, "in the end no judge can know for certain what factors led to the jury's verdict." *Sullivan*, 508 U.S. at 284 (Rehnquist, C.J., concurring). Nonetheless, reviewing courts may capably judge the effect of the unconstitutional admission or exclusion of particular evidence, *Crane*, 476 U.S. at 691, including the admission of an involuntary confession, *Fulminante*, 499 U.S. at 306-12. And they are able to gauge the effect of a partial denial of a defendant's right to be present at trial, *Rushen*, 464 U.S. at 117-19 and n.2, and limitations on the right to cross-examine witnesses, *Van Arsdall*, 475 U.S. at 681-84. By comparison to these errors, assessing the effect of a juror's site visit does not involve an unacceptable level of conjecture.

Our conclusion that harmless error analysis applies here is reinforced by the Supreme Court's treatment of errors that have a more direct influence on the jury's deliberative process. For instance, "the Court has subjected jury instructions plagued by constitutional error to harmless-error analysis." *United States* v. *Gaudin*, 115 S.Ct. 2310, 2321 (1995) (Rehnquist, C.J., concurring); see, *e.g.*, *Yates* v. *Evatt*, 500 U.S. 391 (1991), disapproved in part on other grounds, *Estelle* v. *McGuire*, 502 U.S. 62, 72-3 (1991); *Carella*, 491 U.S. 263; *Rose*, 478 U.S. at 579-82. Juries receive instructions from the trial court, and that guidance carries the court's official sanction. *Yates*, 500 U.S. at 403. Yet

the Supreme Court has held that even an erroneous instruction carrying the court's imprimatur can be harmless if the faulty instruction is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Id.* at 403. The discrete error is viewed from the perspective of the total trial.

If instructional errors that carry the trial court's seal of approval can be harmless, a juror site visit can also be harmless. Far from viewing such a visit as officially sanctioned, other jurors will know that the visit was improper. At a minimum, we cannot conclude that one juror's unauthorized site visit is a structural error that renders every trial inherently unfair. We conclude, to the contrary, that the issue here is amenable to the traditional tools of harmless error analysis.

III.

We must next address which harmless error standard applies to the error alleged in this case. In habeas proceedings, an error is harmful only if it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). We have consistently applied the *Brecht* standard on collateral review. *Tuggle* v. *Netherland*, 79 F.3d 1386, 1392-93 (4th Cir. 1996); *Correll* v. *Thompson*, 63 F.3d 1279, 1291 (4th Cir. 1995), cert. denied, 116 S.Ct. 688 (1996). Sherman argues, however, that the *Brecht* standard is inapplicable here. Relying on decisions of the Eighth Circuit, Sherman asserts that the stricter harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), governs our review because, unlike in *Brecht*, the Maryland courts allegedly failed to apply the *Chapman* standard on direct review. See *Starr* v. *Lockhart*, 23 F.3d 1280, 1292 (8th Cir.), cert. denied, 115 S.Ct. 499 (1994); *Orndorff* v. *Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), cert. denied, 114 S.Ct. 1631 (1994).

Brecht cannot be so easily circumvented. That decision recognizes that a federal court's collateral review of state court convictions implicates the "State's interest in the finality of convictions that have survived direct review within the state court system." *Brecht*, 507 U.S. at 635; see also *Barefoot* v. *Estelle*,

463 U.S. 880, 887 (1983). Based on this weighty state interest, the Supreme Court has frequently applied different rules to direct and collateral review. *Brecht*, 507 U.S. at 633-35. And *Brecht* itself rested on this respect for the finality of state court convictions. As the Court noted, "[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Id.* at 637. Consequently, it concluded that a less onerous harmless error standard was "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying" its habeas jurisprudence. *Id.* at 638.

These principles of federalism, comity, and finality apply regardless of the harmless error standard used by the state court. We have already recognized as much in *Smith* v. *Dixon*, 14 F.3d 956 (4th Cir.) (en banc), cert. denied, 115 S.Ct. 129 (1994). There, we applied the *Brecht* standard in a habeas proceeding where the state court (because it found no error) conducted no harmless error analysis. *Id.* at 974-81. And at least three other circuits have rejected the Eighth Circuit's reasoning. *Castro* v. *Oklahoma*, 71 F.3d 1502, 1516 n. 14 (10th Cir. 1995); *Tyson* v. *Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995), cert. denied, 116 S.Ct. 697 (1996); *Horsley* v. *Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir.), cert. denied, 116 S.Ct. 410 (1995). In the present case, Sherman received full consideration of his claim by the Maryland courts, including a post-trial evidentiary hearing in which juror Miller testified and was subject to cross-examination. See *Brecht*, 507 U.S. at 636. The trial itself occurred some eight years ago. And the federal district court was the fifth court asked to assess the effect of juror Miller's site visit; we are the sixth. Collateral review in this case thus implicates the same interests of respect for final state convictions that animated the *Brecht* decision.

Our conclusion is reinforced by the implications of the rule that Sherman suggests. In many habeas cases, a state court will have rejected the petitioner's claim of error, and thus will have had no opportunity to apply harmless error analysis. *Tyson*, 50 F.3d at 446; *Smith*, 14 F.3d at 979. Sherman would have us ignore Brecht 's commands in these cases, a "limitation that would rob the decision of any general significance." *Tyson*, 50 F.3d at 446.

Moreover, it is unwise to make our harmless error standard turn on a characterization of the state court's standard of review. Hinging a habeas court's standard on such an inquiry will inevitably lead to litigation over what methodology of review the state court applied. This in itself is intrusive. State courts have no obligation to use particular language in considering claims presented in their courts. See *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991). But the rule Sherman proposes will place an implicit obligation on state courts to do just that. Finally, inconsistent harmless error standards on collateral review will prove to be confusing and inequitable. We shall adhere consistently to the *Brecht* standard in collateral proceedings.

IV.

We turn finally to whether juror Miller's site visit had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 637 (citation omitted). We hold that it did not.[1]

At the post-trial hearing in state court, juror Miller testified that two or three days into the trial he drove to the crime scene with his wife. His visit seemed motivated by a simple sense of curiosity. Miller acknowledged that he saw the Sherman house and the tree where police officers recovered the weapon. As he said, he made the visit "so I could see the tree that was so much in question." Based on juror Miller's testimony, it is not clear whether he ever left his car for a more detailed inspection of the area.[2]

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[1] The Antiterrorism and Effective Death Penalty Act of 1996 does not address harmless error standards governing cases arising under 28 U.S.C. § 2254. See Pub. L. 104-132, 110 Stat. 1214 (1996). The Act, however, does require a federal habeas court to defer to state court legal determinations. *Id.*, § 104. In view of the fact that we affirm the district court and deny habeas relief in all events, we have no occasion to address whatever additional hurdles Sherman might face under the Act.

[2] In the state court hearing, Miller did not say — nor was he asked — whether he left his car, and for purposes of our review we need not assume that he merely observed the crime scene from his car. Miller's description of the visit, however, left the impression with at least two

We agree with the district court that Miller's site visit was harmless. First, whatever juror Miller may have observed did not have a "substantial and injurious" influence on the jury's verdict because it was cumulative of the abundant evidence admitted at trial about the crime scene. See *Brecht*, 507 U.S. at 639. That evidence included numerous photographs, videotapes, and extensive testimony about the Shermans' neighborhood and the tree where police found the weapon. The introduction of this large amount of evidence persuaded the Maryland courts that Miller's visit would add little to what the jury already knew. When the state trial court rejected Sherman's motion for a new trial, it referred to its earlier ruling denying a request to have the jury "view" the crime scene: "I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste of time and expense to take the jury out there because I felt the issue was fully covered. So that I think that [Miller's visit] is not of such a magnitude as to warrant a new trial or reversible appeal." Likewise, the Maryland appellate court remarked on the "numerous testimonial references, videotapes, and photographs relating to and depicting the crime scene."

The district court also concluded that Miller's site visit was cumulative of other evidence presented at trial. In particular, the court addressed the specific claim that Sherman presses most forcefully in his petition: that Miller's visit may have led him to conclude that Sherman, despite a slight build, had the ability, as well as the opportunity, to hide the weapon in the thick branches of the tree--an issue Sherman contends was a key contested question at trial. In reviewing this claim, the court granted Sherman the benefit of several assumptions: "that Miller examined the tree, told the other jurors that he disagreed with the photographs, and concluded that it was possible for Sherman to hide the gun in the tree in the condition in which it was found." Even under these

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courts that he stayed in his car. The Maryland Court of Special Appeals said, without more, that Miller "drove to the neighborhood of the murder scene." And the panel of this court that remanded Sherman's petition to the district court for further consideration said that Miller "found the tree but did not leave his car [ ] to inspect it." *Sherman* v. *Smith*, No. 92-6947, slip op. at 5 (4th Cir. 1993) (per curiam).

assumptions, the district court found that the error was harmless because substantial other evidence indicated that Sherman hid the weapon in the tree. That evidence included photographs showing that Sherman had an opportunity to hide the weapon in the tree, which was located on the route between the Sherman and Gibson houses. Testimony introduced at trial also indicated that Sherman had previously used — as a hiding spot — the precise place in the tree where the gun was hidden.[3] In this context, the district court appropriately concluded that the juror's site visit "was cumulative of the detailed evidence presented at trial" about the neighborhood where the murder took place and the hiding place for the weapon.

Second, the state offered powerful evidence at trial from which the jury concluded that Sherman killed his mother and stepfather. The murder occurred in the middle of the night when Sherman was home; there was no indication of forced entry, and the house was equipped with an alarm system. The murder weapon was a 12-gauge shotgun that belonged to the Shermans. Police discovered Sherman's fingerprints above the weapon's trigger assembly and a box of 12-gauge shotgun shells under his mattress. The box itself contained only three shells, and police located two matching (the box held five) expended shells that experts concluded were fired from the murder weapon. Police found the shotgun lodged in the branches of a tree, where, as already noted, Sherman had previously hidden objects and which is located between his own

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[3] Sherman contends that Corporal Hopkins, who removed the weapon from the tree, cast serious doubt on Sherman's ability (because of his slight build) to wedge the weapon in the tree. Hopkins, who was six feet tall and 210 pounds, testified at trial that "with [his] size and stature" he "would have had difficulty putting the gun inside the tree." But Hopkins also testified that the person who put the weapon in the tree "would not [have] to be strong, but had to be forceful." Under questioning, Hopkins even left open the possibility that the weapon could have been thrown into the tree: as he said, he could not "put a figure on the force [used to hide the weapon] or if someone would have thrown it would it have landed in the same position; I can't answer that. It was deeply placed inside the tree." Finally, the state emphasized that the gun proved difficult to remove because the officers did not want to disturb this key piece of evidence. In short, Hopkins' testimony is hardly the confirmation of reasonable doubt that Sherman makes it out to be.

house and that of his grandparents where he ran to report the murder.

Sherman argues, in response, that the question of guilt in this case was a close one. He emphasizes that at trial the state could not point to a motive for the murders. And he notes that officers discovered no gunpowder residue, pine needles or sap on his hands or clothing. Given what he characterizes a close case, Sherman contends that Miller's investigation of the crime scene, and in particular the tree, cannot be considered harmless because the characteristics of the tree were relevant to a crucial disputed point at trial: whether Sherman could have hidden the weapon there.

Sherman's argument is simply overwhelmed by what we alluded to earlier, namely, the powerful array of evidence presented at trial that convinced the jury that Sherman was guilty. And, even if Miller's site visit generated conclusions damaging to Sherman about the tree, we already observed that there was substantial other evidence from which the jury could conclude that Sherman hid the weapon in the tree. In fact, considering the evidence that contributed to the jury's verdict, the juror's site visit is nothing more than a roundabout way for Sherman to challenge the sufficiency of the evidence against him, an argument that Sherman himself admits cannot succeed.

In light of all the evidence presented at trial, we harbor no "grave doubt as to [the] harmlessness" of Miller's site visit. *O'Neal* v. *McAninch*, 115 S.Ct. 992, 995 (1995). We conclude that the unauthorized excursion to the crime scene was harmless. A new trial — some eight years after the fact — would not produce a fairer, more reliable, or more just verdict than the one already rendered.

V.

For the foregoing reasons, we affirm the judgment of the district court and deny Sherman's petition for a writ of *habeas corpus*.

AFFIRMED.

MURNAGHAN, Circuit Judge, dissenting:

The United States Constitution guarantees criminal defendants the right to "a fair trial in a fair tribunal" and a jury verdict "based

upon the evidence developed at the trial." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961) (citations omitted). "This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Id.* In the matter before us, neither the trial nor the tribunal was fair because a juror made an unauthorized and unsupervised visit to the scene of the crime which, though discussed with other jurors, remained undisclosed to the parties and the court until after the guilty verdict had been returned. The majority decision upholding the conviction despite this fundamental flaw, therefore, strikes a blow to the foundations of American criminal jurisprudence and sacrifices the integrity of the means our nation has chosen for what the majority views to be the proper ends in this specific case. Even a wrong that appears slight becomes significant when it has the power to lessen public confidence in our guarantee that a jury trial will be a fair trial, and thus cannot be ignored.

I.

Here, Timothy Sherman's trial was not fairly conducted. At the start of it, jurors received a handbook to assist them in understanding their duties which cautioned them about discussing evidence among themselves and considering information from outside the courtroom. The handbook stated that "a juror should never, while a trial is in progress, inspect the scene of an accident or other event involved in the case."[4] Handbook at 33. The defense asked that the jury be allowed to visit the crime scene, but the trial judge refused.[5] During the presentation of evidence, two central issues arose: whether the defendant — 6'2" tall and weighing but 130 pounds — possessed the physical capability to lodge the shotgun deep into the branches of a thick pine tree as it was found; and whether the defendant could have hidden the gun

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[4] While nothing in the handbook "is to be regarded by jurors as instructions in *law*," the pamphlet makes clear what constitutes proper evidence and that an unsupervised or unpermitted inspection of the scene of the crime is wrong.

[5] The State has asserted that the jury knew about neither the request nor the denial. Those circumstances do not change the fact that a site visit was precluded both before the request and after the denial.

in the tree without generating some outward signal of his efforts, such as a scratch from a branch or tree sap and pine needles on his person.

One juror, confused by the seemingly conflicting testimony on these issues and the unrevealing photographs of the tree, took it upon himself to see, *i.e.*, to witness, "the tree that was so much in question."[6] In disregard of the handbook and without the knowledge of the parties, their counsel or even the judge supervising the trial, the juror and his wife drove one evening after court ended for the day to the subdivision where the crime had occurred.

Because of the sparse inquiry into the matter at a post-trial hearing, we do not have all of the facts concerning the juror's investigation.[7] We do know that he located the Sherman house and then drove through the neighborhood "looking for a tree that was so involved in the case." We also know that he found the tree. We do not know, though, whether the juror touched the tree in an attempt to determine if there was exposed sap or loose needles, or even conducted his own experiment by trying to force something down among the branches. Nor do we know whether he tried to gauge the distance between the two houses and the tree.

The wayward juror told others on the panel of his outing.[8]

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[6] Photographs of the tree and the neighborhood had been introduced at that point in the trial, but the juror wanted a clearer view.

[7] Federal and state evidentiary rules forbid inquiry into how outside influences might have affected the jury's deliberations and verdict, but permit questioning about whether extraneous prejudicial information was improperly brought to the attention of any juror. Fed.R.Evid. 606(b); Md. R. Evid. 5-606(b). Thus the parties could have asked for the details of the juror's visit. The trial judge prohibited the question of why the juror went to the site, but the juror explained his actions anyway, testifying at the post-trial hearing that "the reason why I went there was so I could see the tree that was so much in question."

[8] Sherman has submitted the affidavit of an alternate juror, indicating that the juror told the others about his investigation and shared what he learned. Because that affidavit was not presented before a state court,

The trial judge and the parties learned of the impropriety only after the jury had rendered its verdict, when it was too late to take corrective action. Before deliberations began, therefore, the judge had no reason to remind the jurors to disregard outside viewing of a scene nor to direct them specifically to ignore any information gathered during the juror's visit to Sherman's neighborhood. See *Jeffries* v. *Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993) (finding unfair prejudice where information that the defendant was a convicted criminal was conveyed to jurors outside the courtroom without the attorneys and the judge knowing or having an opportunity to correct), cert. denied, 114 S.Ct. 1294 (1994). We do not know what role the juror's independent investigation played in his own mind or in deliberations because we cannot inquire into such matters. See *Mattox* v. *United States*, 146 U.S. 140, 149 (1892) (holding inadmissible juror testimony regarding the motives and influences which affected the jury's deliberations). Nor do we have juror testimony regarding the presence or absence of prejudice resulting from the visit.[9] See *United States* v. *Seeright*, 978 F.2d 842, 850 (4th Cir. 1992) (finding that a juror's personal

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however, there is some question as to whether it may properly be considered on federal *habeas* review. See *Boggs* v. *Bair*, 892 F.2d 1193, 1199 n. 2 (4th Cir. 1989) (prohibiting the introduction of an affidavit for the first time on federal *habeas* review after determining that it could have been presented at state court proceedings), cert. denied, 495 U.S. 940 (1990). We previously ruled in the present matter that the state court's determination that the unauthorized site visit did not warrant a new trial was not a finding of fact entitled to deference under 28 U.S.C. § 2254(d), but subject to *de novo* review in a federal *habeas* proceeding. *Sherman* v. *Smith*, 8 F.3d 820 (table), 1993 WL 433317, at *4 (4th Cir. Oct. 27, 1993) (unpublished) (No. 92-6947); see also *Lawson* v. *Borg*, 60 F.3d 608, 612 (9th Cir. 1995) (stating that the harmlessness of a constitutional error is not a factual determination entitled to § 2254(d)'s presumption of correctness). It therefore would seem proper for the federal *habeas* court to consider the affidavit, as the district court here did, especially considering the time when the subject arose.

[9] There was no questioning of individual jurors regarding the possibility of taint or prejudice here, nor was there warning by the judge for the jurors to avoid it.

investigation and sharing of result with rest of panel did not warrant a mistrial because the trial judge dismissed the offending juror and questioned each of the other jurors individually and specifically until he was satisfied that they were neither tainted nor prejudiced).[10]

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[10] Like the instant case, *Crockett* v. *Commonwealth*, 47 S.E.2d 377 (1948), concerned a prosecution for murder and an unauthorized, though innocent, jury view of the crime scene. There, though, the question of the burden of proof to show prejudice or lack thereof was at issue. *Id.* at 386. The Virginia Supreme Court of Appeals reversed the conviction and ordered a new trial. *Id.* at 387. Not deciding whether the Virginia rule requiring the defendant's presence on a jury view came into play in the matter before it, the court said a new trial was necessary to protect "the fundamental rights of an accused." *Id.* at 385. The court concluded:

> We cannot say that impressions the jury could have so obtained may not have been harmful to the accused. Though no wrongful action was intended ... the happening casts a shadow of such magnitude over that part of the proceedings as to constitute such misconduct on their part as to impose upon the Commonwealth the burden of disproving any harmful result to the accused. That such proof, under the circumstances here presented, is difficult if not well-nigh impossible, does not render less imperative the necessity of its production.

Id. at 386.

Roberts v. *United States*, 60 F.2d 871 (4th Cir. 1932), also concerned an unauthorized visit by jurors to the scene of the crime involved in the case. There, however, the court found that the mere fact that an unauthorized view took place caused no prejudice to the defendant, but said nothing about on whom the burden of proving prejudice fell. *Id.* at 873. Relying on *Roberts*, the court in *People* v. *Kraus*, 265 N.Y.S. 294 (Ct. Gen. Sess. 1933), found no prejudice shown to have resulted from an independent site visit by a juror who was unaware that his actions were improper. *Id.* at 297-300. The trial court admitted that it had failed to order the jurors not to visit the scene of the crime. *Id.* at 296. Another case invoking *Roberts*, *Orenberg* v. *Thecker*, 143 F.2d 375 (D.C. Cir. 1944), found that an unauthorized visit to the scene brought no extraneous influences to bear upon the jurors and therefore affirmed the trial court's denial of a new trial. *Id.* at 376. *United States* v. *Kansas*

II.

The juror's unauthorized and unsupervised visit clearly amounted to constitutional error as a violation of Sherman's Sixth and Fourteenth Amendment rights. The majority treats the error as a trial defect and holds it to be harmless. If harmlessness were the proper inquiry, I do not agree with the majority's finding. In my opinion, the personal viewing of the tree was harmful because it allowed the injection of evidence without the defendant having an opportunity to object, confront or cross-examine.[11] Actual, secret,

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City, Mo., 157 F.2d 459 (8th Cir. 1946), also relied on *Roberts* in holding that the verdict was not affected by an unauthorized viewing by some of the jurors of the property at issue in the case. *Id.* at 462-63. The court there also made much of the fact that, if a request for permission to view had been requested, it "would doubtless have been granted." *Id.* at 462.

Neither *Roberts* nor its progeny expressed any belief or concern that unauthorized viewing was unconstitutional. While they therefore did not address the question of whether the error was "structural" or "trial," that omission is understandable because they antedated the United States Supreme Court's decision that constitutional errors could be harmless in *Chapman* v. *California*, 386 U.S. 18 (1967). Most significantly, however, these cases did not even allude to the vital rights of confrontation and cross-examination of which the parties were deprived. Nor did they concern situations where a visit to the scene was not only unauthorized but specifically forbidden.

In considering the matter before us, we cannot overlook the fact that evidentiary rules precluded the parties from questioning the jurors--including the maker of the forbidden site visit--as to what effect the unauthorized viewing had on them and that the juror's actions directly violated both the handbook and the trial judge's denial of a jury visit to the scene. Despite the results in *Roberts*, the error in Sherman's case very clearly involves both the flawed structural character of the jury trial he was given and exhibits a behavior infraction that amounted to a fundamental invasion of the defendant's rights.

[11] Unauthorized juror viewing of the scene at issue in an ongoing trial is not generally acceptable conduct. Ruling in an 1888 case deemed "without precedent" and "of the greatest importance," Scottish judges found that a juror's unpermitted and unsupervised visit to the site of an

injury led to "a gross miscarriage of justice." *Sutherland* v. *Prestongrange Coal & Firebrick Co.*, 15 R. (Ct. of Sess.) 494, 495 (Scot. 1888). In setting aside the jury verdict, the judges viewed it as largely irrelevant whether the juror had influenced his fellow panel members. The Lord President explained:

> The jury are empaneled and sworn to return a verdict according to the evidence led before them. They are not entitled to proceed upon anything else but the evidence given upon oath, and if they do proceed upon anything else they cannot return a verdict according to their oath.... I think therefore it is essential to the justice of the case that we should grant a new trial.

Id. at 495-96. A second judge expressed his opinion as follows:

> It is impossible to feel satisfied that the verdict in this case was returned according to the evidence laid before the jury. It is impossible to believe that this gentleman ... was not impressed by what he saw. He therefore gave his verdict upon evidence not obtained at the trial. Whether, or how far, he influenced others by stating the impression made upon himself it is impossible to state, but it is very probable that he did to some extent influence his co-jurors.

Id. at 496 (opinion of Lord Adam).

In *Rex* v. *Ryan*, 4 W.W.R. (N.S.) 32, 101 C.C.C. 101 (Brit. Col. 1951), the court required a new trial after conviction because the jury in a murder case made an out-of-court excursion without the trial judge's permission. The Court of Appeal explained:

> The jury is a legal institution in which the people take great pride. Through it the people take their responsible part in the administration of legal justice. Removal of the jury from all outside influences lies at the very foundation of the confidence that has been maintained in it. It is of the highest importance therefore not only that no communication with outsiders shall actually in fact occur, but also that nothing shall seem to take place which may weaken respect for the jury in the public mind.

physical inspection of the tree can in no way be construed as "cumulative" of the evidence presented at trial, which consisted of photographs, videotape and testimony. The juror presumably would not have made his outing if that evidence were sufficient for him to resolve the issues in dispute. Even the district court, accepting that there was error in the juror's actions but finding it harmless, acknowledged that the prosecution's most crucial photograph, a close-up of the tree, "does not show me anything on its face." It is therefore impossible to believe that the juror's investigation did not impress him and possibly others and impossible to say--as one must in finding harmlessness--that the error did not have "substantial and injurious effect or influence in

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101 C.C.C. at 105 (internal citation omitted).

determining the jury's verdict."[12] See *Brecht* v. *Abrahamson*, 507

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[12] The majority appears to have forgotten the Supreme Court's exhortations not to focus on the guilt of the defendant but on the effect that the error had on the jury's verdict. "Harmless-error review looks ... to the basis on which the jury *actually rested* its verdict ... not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Sullivan* v. *Louisiana*, 113 S.Ct. 2078, 2081 (1993) (citations omitted); see also *O'Neal* v. *McAninch*, 115 S.Ct. 992, 994 (1995) (advising appellate judges, when "in grave doubt" about whether an error was harmless, to treat the error not as harmless, but as though it affected the verdict).

See generally HARRY T. EDWARDS, *To Err is Human, But Not Always Harmless: When Should Legal Error be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995). Chief Judge Edwards asserts:

> Indeed, Chief Justice Rehnquist says that, in any harmless-error review, the role of the appellate court is to "determine whether it is possible to say beyond a reasonable doubt that the error did not contribute to the jury's verdict."
>
> Only last term, the Supreme Court offered up its decision in *O'Neal* v. *McAninch*, 115 S.Ct. 992, (1995)] the crown jewel in the decisions moving away from guilt-based applications of the harmless-error doctrine. In *O'Neal*, the Court considered what action a federal habeas court must take when, upon review of a state-court judgment from a criminal trial, it finds itself left in "grave doubt" as to whether a constitutional error was harmless. The court, in an opinion by Justice Breyer, held that the appellate judge in such a case should treat the error not as harmless, but rather *as though it affected the verdict*. This conclusion, the Court stated, is consistent with the application of the *Kotteakos [v. United States*, 328 U.S. 750 (1946)] standard, which applies even to constitutional errors in habeas proceedings, and which admonishes that "'if [a reviewing court] is left in grave doubt [as to the harmlessness of an error], the conviction cannot stand.'"

Id. at 1201-02 (emphasis in original; footnotes omitted). How can one properly regard as non-structural, or harmless, an error where the defendant is kept altogether ignorant of a witness he should have been

U.S. 619, 637 (1993).

In any event, I believe that harmlessness review is not appropriate here because the error is fundamental and structural.

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allowed to cross-examine about a matter which played such a central part in the case? Chief Judge Edwards describes Justice Breyer's "common-sense view of harmless error focused not on artificial categories of cases, but on notions of fundamental fairness." *Id.* at 1202. He notes that *O'Neal* establishes that "the proper measure of harmlessness is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict,' not whether the record evidence is sufficient absent the error to warrant a verdict of guilt." *Id.* (Emphasis in original; citation omitted).

In note 160, Judge Edwards continues:

> In *Kyles* v. *Whitley*, 115 S.Ct. 1555, 1566 (1995), the Court ruled that, in determining whether the defendant has been prejudiced by a violation of *Brady*, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." ... According to the majority[of the Supreme Court] "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." ... Thus, this case seems to return to *Kotteakos 's* original focus on the severity of the error rather than the cumulative weight of the untainted evidence.

Id. at 1203. The article describes the Supreme Court as making "it clear that '[a]n error may seriously affect the fairness, integrity or public reputation of judicial proceedings *independent of the defendant's innocence*." *Id.* at 1204 (emphasis in original). Judge Edwards concludes by saying that "[t]he mission of the appellate courts in evaluating claims of harmless error should be to address significant errors and ensure fundamental fairness." *Id.* at 1209. The statement is reminiscent of the Supreme Court's admonition that a prosecutor's interest in a criminal case "is not that it shall win a case but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). The interest of the trial judge is at least as great.

The basic framework of our trial system requires that evidence be presented and tested in a public courtroom before the jury, the judge and the defendant. *Turner* v. *Louisiana*, 379 U.S. 466, 472-73 (1965) (stating that "[t]he requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury" and that the Constitution requires "at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel"); see also *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.") Independent and unauthorized jury viewing therefore is prohibited.

The Ninth Circuit Court of Appeals reaffirmed these fundamental principles in a recent opinion. *United States* v. *Noushfar*, 78 F.3d 1442 (9th Cir. 1996). Reversing and remanding for a new trial, the court held that allowing the jury to listen to matters that had never been presented in open court requires reversal because the jury's consideration of evidence is "a stage of the trial at which the presence of the defendant is required." *Id.* at 1444. The court went on to say:

> The court completely abdicated control of the presentation of the evidence.... In cases where the error is so fundamental and defies meaningful review, we have said that harmless or plain error analysis may not be applied. Instead, we find the error to be a structural error requiring automatic reversal.... [In an earlier case,] we said that structural error analysis was the correct approach where there was a "complete abdication of judicial control over the process."

Id. at 1445.[13]

A mistake that violates basic trial structure and taints the entire process is most properly labelled "structural error." See *Brecht*, 507 U.S. at 629-30 (discussing difference between structural and trial error);[14] *Arizona* v. *Fulminante*, 499 U.S. 279, 306-10, 111 S.Ct. 1246, 1262-65, 113 L.Ed.2d 302 (1991) (same). The impact of a juror's personal gathering of evidence outside the courtroom by way of an unsupervised -- indeed forbidden -- viewing is difficult to isolate and assess. See *Fulminante*, 499 U.S. at 307-09 (explaining that trial error may be "quantitatively assessed ... in order to determine whether its admission was harmless" while structural error defies such analysis);[15] see also *Brecht*, 507 U.S.

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[13] The opinion of the majority in the instant case therefore seems to create a circuit split inviting the Supreme Court to grant *certiorari*. Perhaps then the majority opinion would be shown to have but a short life.

[14] It should not be overlooked that the Supreme Court in *Brecht* relied very much on the fact that state courts had earlier found the error harmless beyond a reasonable doubt in concluding that the federal court on *habeas corpus* review need not duplicate the analysis set forth in *Chapman*, 386 U.S. at 24. *Brecht*, 507 U.S. at 635-38. Here, there was never a state court finding pursuant to *Chapman*, so requiring that inquiry may not as easily be viewed duplicative and unnecessary.

[15] Again, there was no opportunity in Sherman's case to determine whether the error could be cured and thus deemed harmless. Neither the trial judge nor Sherman knew of the site visit and resulting breach of Sherman's right of cross-examination until after the jury had rendered its verdict. Under different circumstances, the matter might well require a different outcome. The fact remains, however, that the error in Sherman's case remained unaddressed and uncured, and thus violated the entire structure of the trial.

Although it concerned somewhat different circumstances, *State* v. *Magwood*, 432 A.2d 446 (Md. 1981), is instructive. There, the trial judge permitted a jury hearing a criminal case to separate overnight despite the fact that it was in the midst of deliberations. The defendant's counsel agreed to the separation and the defendant did not object, and the judge gave the jury the ordinary admonition "not to discuss the case during their overnight separation or to consult outside references." *Id.*

at 629 (same). Its pervasive nature cannot be discounted in an attempt to consider whether it was harmless.

Even if the information gleaned could be called harmless because it did not substantially influence the jury's verdict, the independent investigation undermined the integrity of the trial and thus the jury's decision.[16] The harmful and truly the structural nature of the juror's unauthorized and undisclosed visit to the tree becomes clear with the realization that Sherman was, as a consequence, deprived of his right to cross-examine the undisclosed

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432 A.2d at 447. In analyzing the claim of error, the Maryland Court of Appeals emphasized the judge's instruction not to discuss the case and "not to consult outside sources." *Id.* at 451. Although it found no demonstration of "any violation of this court instruction," the court of appeals declared that if a breach of the prohibition had occurred, the remedy would have been "to attack the jury verdict as improperly reached." *Id.* The court further found that counsel's acceptance of the jury separation waived the defendant's right to a sequestered jury, but noted that only the defendant could have waived his right to confront witnesses against him. *Id.* at 450. Here, of course, neither Sherman nor his counsel could waive his rights because they did not know of the unpermitted jury excursion. Furthermore, the forbidden juror activity actually occurred.

It is also helpful to consider *State* v. *Collins*, 288 A.2d 163 (Md. 1972). There, notice of a deposition was sent to, but not actually received by, the defendant. His counsel nevertheless appeared and cross-examined the witness. *Id.* at 168. The Maryland Court of Appeals reversed the conviction and remanded for a new trial, noting that it had made "assiduous efforts to protect the constitutional guarantee of confrontation at all stages of a trial" and that "these efforts would be meaningless if this inviolable right could be circumvented by allowing the deposition of a witness, taken while the accused is involuntarily absent, to be admitted in evidence at trial." *Id.* at 170.

[16] In *Sutherland*, the Scottish court required a new trial although it could not be sure whether the improperly behaving juror influenced his fellow jurors or himself. 15 R. (Ct. of Sess.) at 495-96. The court essentially found that the jury's verdict was structurally deficient, ruling that it had not been returned "according to their oath." *Id.* at 495.

witness.[17] Contained in the Sixth Amendment's guarantee that a defendant will be informed of the nature of the accusation and confronted with the witnesses against him, cross-examination is both a fundamental right and perhaps the most critical tool to be employed in the representation of a criminal defendant. *Pointer*, 380 U.S. at 404-05. Allowing a juror to conduct his own investigation outside the courtroom in an attempt to answer questions that arose in the criminal matter before him certainly "affects the framework within which the trial proceeds" and justifies automatic reversal of the conviction. *Fulminante*, 499 U.S. at 309-10. I therefore do not believe that we can say that Sherman's trial "reliably serve[d] its function as a vehicle for determination of guilt or innocence, and that [the] criminal punishment may be regarded as fundamentally fair." *Id.* at 310

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[17] The outcome in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), illustrates an essential distinction. Upon review of a reversal of a conviction because of a restriction on the defendant's ability to cross-examine a witness which violated his Confrontation Clause rights, the Court remanded to allow harmlessness to be explored. *Id.* at 684. Unlike Sherman's situation, the defense in *Van Arsdall* was fully aware of the bias issues it sought to explore with cross-examination, but was denied the opportunity. Hence, remand to examine whether prejudice or harm had occurred was appropriate, for the error was a trial error. On remand, the Supreme Court of Delaware held that the error violated the Delaware Constitution and was not harmless. *Van Arsdall* v. *State*, 524 A.2d 3, 6 (Del. 1987).

Sherman, though he would be aware of how vital cross-examination of the errant juror would be if he testified, was totally ignorant that the juror had in essence become a witness subject to cross-examination. Thus, harmlessness could not possibly be found. Under the circumstances of *Van Arsdall*, knowledge of the witness's presence and the possibility of exploration by cross-examination perhaps allowed the error to be treated as a "trial" error. In Sherman's case, however, the error was clearly "structural" from the moment it occurred. Sherman, altogether unaware that he was being denied the right of confrontation, cannot be faulted for not attempting to cross-examine. The artificial category of cases labelled "Confrontation Clause" cases and deemed amenable to harmless-error review should not be permitted to eradicate "notions of fundamental fairness."

(quoting *Rose* v. *Clark*, 478 U.S. 570, 577-78 (1986)). It is not fundamentally fair to the parties for a juror, in effect, to conduct privately his own trial.

A juror's reliance upon extrinsic information, even if that information is accurate and useful, "would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained."[18] *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907). "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence." *Id.* The majority here ignores that fundamental precept and suggests that, in some cases, jurors may ignore a judge's orders and seek whatever information they like about a case from whatever source they wish.[19] It overlooks the structural character of the error, as well as the destructive effect on the public's trust, to allow a jury trial to be conducted with such blatant violations of governing rules.

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[18] Again, the principle is fundamental to Anglo justice systems. In ordering a new trial after jurors had improperly asked questions of a boatman taking them on an authorized view, an Australian court stated:

> It is quite clear that a jury, sworn to find their verdict according to the evidence, cannot have any evidence before them except such as is adduced in open Court, and if such evidence, whether it be oral or in writing, come to them the verdict may be avoided.... Nor is the case altered by the fact that the evidence so given out of Court may be true.

Smith v. *Neild*, 10 N.S.W.L.R. 171, 173 (Aus. 1889) (citations omitted).

[19] There is no indication that the misbehaving juror here was sanctioned, or otherwise rebuked or punished, once the error he committed became known. The lack of such a response suggests that any juror may so violate a court's directions with impunity. The majority underscores the message by allowing the error to stand uncorrected. Its decision controls not only in Harford County, Maryland, but in every city and county in the five states comprising the Fourth Circuit. Hereafter jurors will feel free to disregard instructions not to perform unsupervised viewing of the scene of the crime.

III.

Some errors are so egregious that they must be corrected, even if the result is to overturn a guilty verdict. "Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison.... For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy." *Fay* v. *Noia*, 372 U.S. 391, 441 (1963).

The result of granting *habeas* relief in this case would not necessarily be to let a convicted killer go free. The State of Maryland would have an opportunity to retry Sherman properly in an attempt to secure a conviction from an untainted jury. Here, "[p]ublic confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." *Sherman* v. *United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring). Sherman may well have killed his parents, but we are a less civilized nation if we do not require the State to prove in a fair trial that he did so. It is not enough merely that a defendant committed a crime. The fundamental tenets of our justice system require that he be convicted properly.

IV.

For the above reasons and those contained in the earlier majority opinion of the panel, *Sherman* v. *Smith*, 70 F.3d 1263 (4th Cir. 1995) (unpublished) (per curiam), vacated and reh'g en banc granted (4th Cir. Jan. 18, 1996), I respectfully dissent. I would favor the grant of the writ of *habeas corpus*.

Judge Ervin and Judge Michael join in this dissent.

DIANA GRIBBON MOTZ, Circuit Judge, concurring in part and dissenting in part:

As the Supreme Court has specifically recognized, the right at stake here, the right to have "a jury's verdict ... based upon the evidence developed at trial [,] goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner* v. *Louisiana*, 379 U.S. 466, 472 (1965). Unfortunately, the atrocious crimes committed and abundant circumstantial evidence

pointing to Sherman as the perpetrator have led the majority to disregard this bedrock principle. Regardless of how much sympathy we have for the victims or how certain we may be of Sherman's guilt, we must follow the Constitution. Adherence to it does not require that Sherman be released but it does require that he be provided a new trial. Accordingly, although I agree with some of the majority's conclusions, I must respectfully dissent from its holding.

I.

Most constitutional errors are trial errors and can be harmless, but some "will always invalidate the conviction." *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993). Such "structural defects in the constitution of the trial mechanism ... defy analysis by 'harmless-error' standards." *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). Structural errors are those that affect "the framework within which the trial proceeds." *Id*. The right at issue in this case — the right to be convicted solely on the basis of evidence presented at trial — seems to me to fit squarely within this definition. Thus, an error involving this right, like errors involving the related right to a public trial or the right to be represented by counsel at trial, should be deemed structural. If we were writing on the proverbial clean slate, I would so hold.

After all, of what consequence is the right to counsel, to an impartial judge, to a public trial, to a correct reasonable doubt jury instruction,[20] or to a criminal trial at all, if a defendant can be convicted based on evidence not presented at trial. The right to have a conviction based only on the evidence presented at trial, like other rights whose deprivation constitutes structural error, is one of those protections without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as

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[20] Deprivations of each of these rights has been held to be structural error. See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (reasonable doubt instruction); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (public trial); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (counsel at trial); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (impartial judge).

fundamentally fair." *Rose* v. *Clark*, 478 U.S. 570, 577-78 (1986) (citation omitted).

Permitting a verdict to be based on evidence other than that presented at trial, like other structural errors, has repercussions that are "necessarily unquantifiable and indeterminate, unquestionably qualif[ying it] as 'structural error.'" *Sullivan*, 508 U.S. at 282. This is particularly true in light of the rules of evidence and the restrictions they quite legitimately place on any inquiry into jury deliberations. See *Tanner* v. *United States*, 483 U.S. 107, 117-125 (1987). Because they prohibit any inquiry into the effect that additional, unopposable, and possibly inadmissible evidence might have on a jury, a juror's exposure to such evidence is necessarily unquantifiable and indeterminate. See *United States* v. *Bagley*, 473 U.S. 667, 693 (1985) ("The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know which piece of information might make, or might have made, a difference") (Marshall, J., dissenting).

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of a defendant's right of confrontation, of cross-examination, and of counsel." *Turner*, 379 U.S. at 472-73.[21] Consequently, just as when a jury is given an improper reasonable doubt instruction, when a verdict is not based solely on evidence presented at trial, "there has been no jury verdict within the meaning of the Sixth Amendment" and so "no object ... upon which harmless error scrutiny can operate." *Sullivan*, 508 U.S. at 280. The most an appellate court can conclude in the case at hand is that a jury would surely have found the defendant guilty based on the evidence presented at trial. A court cannot conclude anything about the jury's actual finding of guilt, because that finding was based to some unknown extent on evidence that was *never* presented at trial. *Cf. id.* at 279-80.

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[21] Significantly, as noted above, the deprivation of a defendant's right to a public trial or to counsel is considered structural error. The error in this case deprived Sherman of the remaining *three* components the Court recognized in *Turner* as essential to the fundamental right to trial by jury. Surely this error should also be considered structural.

The majority rightly recognizes that an error should not be deemed structural unless its presence renders "unfair" every criminal conviction in which the error occurs. See Maj. Op. at 1138. Structural error, however, is not merely a "shorthand" form of harmless error analysis, rather it involves the broader question of the fundamental fairness of the trial process. Accordingly, an error that so infects a trial as to render the process fundamentally unfair is structural, regardless of whether, looking narrowly at its "actual impact" on the verdict, the error might sometimes be deemed harmless.

For example, the Supreme Court has held that the denial of the right to a public trial is structural error, *Waller*, 467 U.S. at 49 n. 9, because it renders the entire process unfair, not because such an error can never be "harmless" in terms of its impact on the jury's verdict — the harm is to the trial process, not necessarily to the specific verdict reached. Similarly, because a juror's unsupervised and unauthorized site visit, in a case in which the physical characteristics of that site are critical to the case, deprives the defendant of the right to be convicted solely on the basis of evidence presented at trial, it too renders the trial process fundamentally unfair. Such an error would seem to me therefore to be structural error, whether or not one can imagine factual scenarios in which the information obtained by the juror has no impact on the jury's deliberations or verdict.

Nor would such a holding require reversal *in every case* in which a juror engaged in an unauthorized site visit. The majority convincingly explains the difficulties of a holding that would lead to this result. However, the majority has created and then defeated a straw man. Sherman specifically disavows any request for such a broad ruling. Instead, he maintains that unauthorized site visits amount to constitutional error only in cases in which "significant issues were raised at trial concerning the physical aspects of the areas visited by the juror." Brief of Appellant at 21 (quoting *Commonwealth* v. *Price*, 344 A.2d 493, 494 (1975)).

An analysis that results in finding constitutional error in some circumstances but not in others is unusual, but not unprecedented. Indeed, as Sherman points out, the Supreme Court has adopted a similar approach in examining court orders forbidding criminal defendants from consulting with counsel. An order preventing a

defendant from consulting with counsel during an overnight recess interferes with his Sixth Amendment right to counsel, and reversal is required; the error is not examined for harmlessness and no proof of prejudice is necessary. See *Geders* v. *United States*, 425 U.S. 80 (1976). In contrast, an order preventing a defendant from consulting with counsel briefly during his testimony is regarded as so *de minimis* as not to be constitutional error at all. *Perry* v. *Leeke*, 488 U.S. 272, 280-84 (1989). Between these two extremes, there is "a line of constitutional dimension." *Id.* at 278-80.

In the same way, unauthorized site visits in cases in which the physical aspects of the site are not at issue should be regarded as *de minimis* -- not constitutional error at all. This approach has much to recommend it. It protects the fundamental right involved here, yet avoids trivialization of the structural error inquiry.

Because the Supreme Court has never dealt with a case involving juror's unauthorized site visit — let alone such a visit in a case, like this, where the physical features of the site are of critical importance, no direct precedent prohibits the above approach. However, in those cases involving what I regard as the most similar constitutional errors — unauthorized private contacts with jurors during trial — the Supreme Court seems to have applied a harmless error analysis, holding that such contacts require reversal of a conviction only if the government fails to "establish, after notice to and hearing of the defendant that such contact *was harmless* to the defendant." *Remmer* v. *United States*, 347 U.S. 227, 229 (1954) (emphasis added).[22] See also *Mattox* v. *United*

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[22] The majority characterizes the instant case as "virtually indistinguishable" from both *Remmer* and *Smith* v. *Phillips*, 455 U.S. 209 (1982). I agree that the error involved in this case is very similar to the error in *Remmer*. However, as this court recognized in *Stockton* v. *Virginia*, 852 F.2d 740, 744 (4th Cir. 1988), cert. denied, 489 U.S. 1071 (1989), *Phillips* involves clearly distinguishable concerns. As we explained in *Stockton*, when, as in *Phillips*, "some external manifestation of a juror's predisposition subsequently calls the juror's impartiality into question, the *defendant is afforded the opportunity* to establish the juror's actual bias." 852 F.2d at 744 (emphasis added). On the other hand, where, as in the case at hand and *Remmer*, "the danger is not one of juror impairment or predisposition, but rather the effect of an extraneous

States, 146 U.S. 140, 150 (1897) ("Private communications, possibly prejudicial, between jurors and third persons ... are absolutely forbidden, and invalidate the verdict, at least *unless their harmlessness is made to appear.*") (emphasis added).

Both *Remmer* and *Mattox* were decided well before 1991, when the Supreme Court first began analyzing constitutional error in terms of structural error, which is not subject to harmless error analysis, and trial error, which is. See *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). Indeed, *Remmer* and *Mattox* predate many of the Court's landmark decisions regarding the constitutional protections due to criminal defendants. *E.g.*, *Edwards* v. *Arizona*, 451 U.S. 477 (1981); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). Consequently, if *Remmer* or *Mattox* were decided today, the Court might well regard the errors in them as structural.

Alternatively, the Court might conclude that even if harmless error analysis applies to unauthorized contacts with jurors, a juror's unsupervised and unauthorized visit to examine for himself the disputed physical aspects of a site presents a more fundamental problem meriting treatment as structural error. A juror's private fact-finding mission, which results in new facts being presented to the jury without the benefit of cross-examination by (or even the knowledge of) the defendant, certainly presents more serious Confrontation Clause problems than juror contacts having nothing to do with the facts of the case. Thus, when the Supreme Court is presented with an appropriate case, it may well conclude, as my dissenting colleagues do, that the error involved here is indeed structural.

However, in view of *Remmer* and *Mattox*, the Supreme Court's reluctance to classify errors as structural, and the decisions of this court extending *Remmer* to cases involving a jury's exposure to unadmitted evidence, see *United States* v. *Barnes*, 747 F.2d 246, 251 (4th Cir. 1984); see also *Hinkle* v. *City of Clarksburg*, 81 F.3d

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communication upon the deliberative process of the jury, the defendant's right to an impartial jury requires that *the government bear the burden* of establishing the nonprejudicial character of the contact." *Id.* (emphasis added).

416, 427 (4th Cir. 1996) (following *Barnes* without citing *Remmer*), I believe that I am bound to treat the error here as trial error, subject to harmless error analysis. I therefore turn to that analysis.

II.

On collateral review, we may set aside a conviction only if convinced that the asserted error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)).[23] If we find the issue so close as to leave us "in virtual equipoise as to the harmlessness of the error," we must resolve the question in favor of the petitioner and grant habeas relief. *O'Neal* v. *McAninch*, ____ U.S. ____, 115 S.Ct. 992, 994 (1995).

In the instant case, the state trial court held a hearing on Sherman's motion for a new trial, and juror Miller was called to testify on Sherman's behalf. On direct examination, the juror testified that two or three days into the trial, he and his wife drove to Gibson Manor, "looking for [the] tree that was so involved in the case." He stated that he did, in fact, find the tree as well as the house in which the murders occurred. Apparently wary of violating the secrecy of the jury's deliberations, and consistent with the State's objections, the court did not permit Sherman's counsel to ask the juror why he visited the site.

On cross-examination by the State, the juror testified that by the time he visited the site, he had already seen (in court) the videotape of the outside of the Sherman house, but was not sure if he had yet seen the aerial photographs of the neighborhood. When asked whether, at the time of his site visit, several photographs of the tree had been introduced, the juror responded, "Yes, the tree had been in question, and that's one of the reasons I went there." Finally, the State asked the juror whether other photographs of the

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[23] Like the majority, I believe that our decision in *Smith* v. *Dixon*, 14 F.3d 956 (4th Cir.) (en banc), cert. denied, ___ U.S. ___, 115 S.Ct. 129 (1994), established that the *Brecht* standard applies on collateral review, even when the state court has failed to find an error harmless beyond a reasonable doubt.

scene had been introduced by the time he made his visit, to which he responded, "I'm not sure, sir. I'm not sure what sequence--the reason why I went there was so I could see the tree that was so much in question." The State made no further inquiry into the facts and circumstances surrounding the juror's site visit.

All told, the record regarding the asserted error provides the following information:

> (1) Two or three days into the trial, the juror drove to the neighborhood in which the murders occurred, looking for the tree in which the murder weapon was found.
>
> (2) The juror saw the Sherman house and the tree.
>
> (3) This visit occurred after a videotape of the outside of the Sherman house was played for the jury, and after the jury saw several photographs of the tree.
>
> (4) The juror's stated purpose for this site visit was to "see the tree that was so much in question."

To this day, no details of the juror's site visit are known. We do not know, nor did the state trial court know, for example, the length of the juror's site visit; how close he came to the tree; whether he got out of his car and walked to the tree or simply drove past; whether he performed "experiments" based on the testimony about the tree or merely looked at it to ascertain its size and location. Despite the sparsity of the record, the state trial court determined that Sherman suffered no prejudice as a result of the juror's site visit.[24] I cannot agree.

Based on the extremely limited information before us regarding the juror's site visit, it is simply impossible to ascertain whether and to what extent Sherman was prejudiced by the visit. The juror's testimony is consistent with a visit in which he simply drove through Gibson Manor and looked at the house and the tree as he

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[24] In my view, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996), does not apply retroactively to cases like the one at hand. See *Landgraf* v. *USI Film Prods.*, ____ U.S. ___, 114 S.Ct. 1483, 1505 (1994).

drove by. Such a visit, if properly subject to harmless error analysis, might well be found to be harmless.[25]

However, the juror's testimony would be equally consistent with a scenario in which, dissatisfied with the evidence presented at trial, he set out to conduct his own investigation, including taking measurements of the tree and its distance from the house and attempting to hide items in the tree in the manner in which the murder weapon was found. Such a visit would certainly be prejudicial. Contrary to the majority's suggestion, Maj. Op. at 1142, it would not be merely "cumulative" of the other evidence at trial, as the proper interpretation of that evidence was disputed. For example, perhaps confused by the parties' conflicting interpretations of Officer Hopkins' testimony, the juror sought to resolve for himself whether someone of Sherman's height and build could have wedged the gun in the tree in the manner in which it was found. Alternatively, perhaps the juror wanted to test whether it was possible to hide something in the tree without getting sap and pine needles on one's clothing, or wanted to see whether it made sense for Sherman to have stopped at the tree *en route* to his grandparents' house. Each of these scenarios would result in the discovery of *new*, rather than cumulative, information.

The State of Maryland seems to concede, as it must, that the record in this case with respect to the juror's site visit leaves much to be desired. The State argues, however, that "Sherman had the burden to show that an error warranting new trial relief had occurred," Brief of Appellees at 28, and thus should bear the consequences of the insufficient record. This argument is foreclosed by *Remmer*, which mandates that any private communication with a juror about the matter pending before the jury is "presumptively prejudicial," and the *government* bears the heavy burden of rebutting that presumption. 347 U.S. at 229. Moreover, we have recognized as recently as a few months ago, in a case that the majority neither overrules nor acknowledges, that

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[25] As noted above, this does not preclude characterization of that error as structural. The harmless error inquiry focuses on the impact of an error on the verdict rendered. Structural error is concerned with the integrity and fairness of the trial process, not the impact of a particular error on the actual verdict.

this presumption governs when jurors consider evidence not admitted at trial. See *Hinkle*, 81 F.3d at 427. See also *United States* v. *Brooks*, 957 F.2d 1138, 1142 (4th Cir.), cert. denied, 505 U.S. 1228 (1992); *United States* v. *Greene*, 834 F.2d 86, 88 (4th Cir. 1987); *Barnes*, 747 F.2d at 250-51. Accordingly, while Sherman bore the initial burden of proving that the site visit occurred,[26] once that fact was established, the burden shifted to the State to "demonstrat[e] the absence of prejudice." *Stockton*, 852 F.2d at 743.

Concededly, due to the significant restrictions the rules of evidence place on questioning of jurors, it would have been difficult, if not impossible, for the State to prove by direct evidence that the juror's site visit did not prejudice Sherman. We have suggested that "the state may rebut the presumption of prejudice through whatever circumstantial evidence is available, including juror testimony on the facts and circumstances surrounding the extraneous communication [or receipt of unadmitted evidence]." *Id.* at 744. Ultimately, however, because "[t]he right to an impartial jury belongs to the defendant," the risk of being unable to prove the impact of an improper jury contact or a jury's exposure to unadmitted evidence is properly borne by the State. *Id.* at 743-44. In this case, the State simply failed to meet its burden.

The only circumstantial evidence the State presented to meet its heavy burden was the juror's testimony that at the time he made

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[26] *Remmer* requires that the improper jury contact be "about the matter pending before the jury." 347 U.S. at 229, 74 S.Ct. at 451. *Stockton* likewise requires that the defendant establish that the contact "was of such a character as to reasonably draw into question the integrity of the verdict." 852 F.2d at 743. Our cases applying the *Remmer* presumption where the jury has been exposed to evidence not admitted at trial suggest that, in such cases, the defendant need only establish that the jury has, in fact, been exposed to the unadmitted evidence to trigger the presumption. See, *e.g.*, *Hinkle*, 81 F.3d at 427. In any event, in this case, by establishing that a juror had engaged in an unauthorized site visit and that the physical characteristics of that site were of critical importance, Sherman satisfied the additional requirements described in *Remmer* and *Stockton*.

the visit, the jury had already seen a videotape and some photographs of the area in question. While the State argues (and a majority of this court finds) that the site visit was merely cumulative of the other evidence presented at trial regarding the tree, the juror's testimony in response to *the State's* questions indicates otherwise. When asked whether he had seen the photographs of the tree prior to his visit, the juror responded that *that* was why he went to the site — because he wanted to see the tree "in question." This implies a causal relationship between the photographs and the visit; the juror was not satisfied with the photographs and visited the site to obtain additional information about the tree. As my dissenting colleagues note, the district court, which nonetheless found the site visit to be harmless error, remarked that the state's close-up photograph of the tree "does not show me anything on its face."

The majority makes much of the "powerful array of evidence presented at trial" that supports the jury's guilty verdict. This misconceives the appropriate harmless error inquiry, which focuses not on the sufficiency of the evidence absent the error, but rather on the impact of the error on the jury's verdict. See *Sullivan*, 508 U.S. at 279 ("Harmless error review looks ... to the basis on which the jury *actually rested* its verdict .... not [to] whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered.") (internal citation and quotation omitted). Accordingly, the majority's characterization of Sherman's argument as merely a "roundabout" attack on the sufficiency of the evidence against him is off the mark. Sherman does not challenge the sufficiency of the evidence presented at trial, he challenges the fairness of the trial and "the basis on which the jury *actually rested* its verdict." *Id.*

In summary, the record in this case reveals that a juror in Sherman's capital murder trial made an unsupervised and unauthorized visit to a site whose physical characteristics were disputed and critical to the State's case. Unfortunately, the record does not reveal much else about that visit. At the post-trial hearing, the burden was on the State to rebut the presumption of prejudice raised by the juror's site visit, and the State must therefore bear the consequences of the sparsity of the record. Given the lack of detail as to the juror's site visit and the wide

range of conduct that his testimony might describe, the majority's conclusion that the site visit was harmless is tantamount to a conclusion that a juror's unauthorized site visit can *never* be prejudicial error. I cannot agree with this conclusion. While some of the possibilities encompassed by the juror's ambiguous testimony might be harmless, many of them would certainly be prejudicial.

Without any evidence as to the details of the juror's site visit, I find myself "in virtual equipoise as to the harmlessness of the error." *O'Neal*, 115 S.Ct. at 992. My "grave doubt as to the harmlessness of [the] error" requires me to resolve the issue in Sherman's favor. *Id.* at 999. The "obviousness" of Sherman's guilt to a reviewing court, or to the public for that matter, is irrelevant absent a proper jury verdict. I would, therefore, grant the writ of habeas corpus, so that Sherman could receive a new trial in which the jury returns a proper verdict, based solely on the evidence presented at trial. The Constitution requires nothing less.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 94-6831

TIMOTHY SCOTT SHERMAN, *Petitioner-Appellant,*

v.

WILLIAM L. SMITH, Warden,
Maryland House of Correction Annex; JOHN JOSEPH CURRAN, JR., Attorney General for the State of Maryland,
Respondents-Appellees.

Argued: September 27, 1995.

Decided: December 4, 1995.

ARGUED: Andrew Lewis Frey, Mayer, Brown & Platt, Washington, D.C., for Appellant. Ann Norman Bosse, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, Baltimore, Maryland, for Appellees. ON BRIEF: Roy T. Englert, Jr., James G. Duncan, Mayer, Brown & Platt, Washington, D.C.; Stuart J. Robinson, Bel Air, Maryland, for Appellant. J. Joseph Curran, Jr., Attorney General of Maryland, Criminal Appeals Division, Office of the Attorney General, Baltimore, Maryland, for Appellees.

Before MURNAGHAN and WILKINSON, Circuit Judges, and BEATY, United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

PER CURIAM:

Timothy Sherman, convicted in the Maryland Circuit Court for Harford County for the shotgun murders of his mother and stepfather, sought *habeas corpus* in the federal district court because of a claimed error which occurred during his trial. A juror, without the trial judge's permission and in contravention of the handbook distributed to jury members at the start of the trial,[1] visited the scene of the crime and particularly, a tree in the branches of which authorities had located the murder weapon. The juror explained to another jury member that he went "so that everything would be clearer in his mind" and because he was dissatisfied with the photographs of the tree.[2] The district court presumed error, but found it harmless trial error and denied the writ.[3]

It appears evident that there was error. Not following a rule that is consistently and uniformly practiced cannot be correct. However, the question remains whether the error was harmless. *Brecht* v. *Abrahamson*, 113 S.Ct. 1710, 1722 (1993). Because we have concluded that the error was not harmless, *O'Neal* v. *McAninch*, 115 S.Ct. 992, 995 (1995), there is no reason for us to investigate whether it was structural. See *Arizona* v. *Fulminante*, 499 U.S. 279, 306-10 (1991) (discussing distinction between structural and trial errors). We need only to give the error significance, even if it is merely trial error.

Our conclusion of non-harmlessness proceeds from the consequences of several circumstances:

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[1] At sentencing, the trial judge acknowledged that "there's no question that [the juror] had violated instructions which were given about not doing his own investigation" but then found the visit did not constitute prejudicial error.

[2] The trial judge had refused Sherman's request for a jury visit to the crime scene. He believed "the issue was fully covered" and consequently, the trip would be a waste of time and resources.

[3] See *Sherman* v. *Smith (Nuth)*, 8 F.3d 820 (4th Cir.1993) (table) (per curiam); *Sherman* v. *Smith (Nuth)*, No. 91-2006 (D. Md. July 28, 1994).

1) It denigrates much of our entire judicial system when a juror takes into account factual matters not before the jury as a whole and communicates what he so has learned to other jurors, all in contravention of the jury instructions.[4]

2) The capability of Sherman to place the shotgun amid the branches as it was found was a question in the trial, and an answer to it, for a juror dissatisfied with the photographs of the tree,[5] could be clarified by an actual visual inspection.[6]

3) The juror's description of his erroneous visual viewing may well have affected the factual viewpoints of the other jury members.

4) Aside from what the view of the tree would disclose, the other evidence against Sherman was conflicting, particularly since no evidence of gunpowder residue was found on Sherman.[7]

We cannot say, therefore, that the error did not have a "substantial and injurious effect or influence" on the jury's verdict.

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[4] The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a trial by an impartial jury, *Stockton* v. *Virginia*, 852 F.2d 740, 743 (4th Cir.), cert. denied, 489 U.S. 1071 (1989), and Due Process requires that a jury verdict be based solely upon evidence developed at trial. *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982); *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961).

[5] The federal district judge declared that the prosecution's most crucial photograph, a close-up of the pine tree, "does not show me anything on its face."

[6] The attorneys at the sentencing hearing were prohibited from inquiring why the juror searched for the neighborhood and the tree. Yet the evident effect of doing so illuminates the motivation behind his investigation. In addition, the juror testified: "The reason why I went there was so I could see the tree that was so much in question."

[7] *United States* v. *Williams-Davis*, 821 F. Supp. 727, 740 (D.D.C. 1993), involved a juror who conducted an unauthorized crime scene visit while on an evening's outing all over Washington, D.C. but testified that the trip failed to affect his ability to render a fair and impartial verdict. The jurors in the instant case have not so testified about a particular scene. The *Williams-Davis* case is, therefore, distinguishable.

Brecht, 113 S.Ct. at 1722 (citing *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946));[8] see also *O'Neal*, 115 S.Ct. at 995. What the juror saw and what he described to other jurors certainly influenced the jury's verdict. Unlike other cases in which courts

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[8] *Brecht* v. *Abrahamson* adopted the standard articulated in *Kotteakos* v. *United States* as generally applicable for federal habeas review of constitutional error. *Brecht*, 113 S.Ct. at 1722. In its opinion, the U.S. Supreme Court noted that it was the sixth court to pass on the question before it. The state courts that had considered the matter on direct review had done so using the harmless-error analysis set out in *Chapman* v. *California*, 386 U.S. 18, 24 (1967), which requires the prosecution to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The Court concluded that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review." *Brecht*, 113 S.Ct. at 1721. The *Brecht* Court refused to assume that state courts would fail to apply the appropriate standard on direct review and explained that state courts "are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error." *Id.* The Court determined that requiring federal habeas courts to apply the same standard after state courts have done so might "undermine[ ] the States' interest in finality and infringe[ ] upon their sovereignty over criminal matters." *Id.*

A large support for *Brecht 's* holding that federal habeas courts need only determine if the error substantially impacted the jury's verdict, therefore, was the fact that state courts traditionally have applied *Chapman* in reviewing constitutional errors on direct review. Hence the Court's determination that requiring the federal court to apply the same test when the state court has already done so would be duplicative. In the present case, however, no court--state or federal--has applied the *Chapman* test, so to require it in the federal *habeas corpus* case would not be duplicative. See *Starr* v. *Lockhart*, 23 F.3d 1280, 1292 (8th Cir.), cert. denied, 115 S.Ct. 499 (1994); *Orndorff* v. *Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), cert. denied, 114 S.Ct. 1631 (1994). While the question of which standard a federal habeas court is to apply in such a situation has not been definitively answered by this court, we do not need to confront the question here because the error in this case cannot be deemed harmless under either standard.

have found an error harmless in light of "overwhelming" or clear evidence against the defendant, see, *e.g.*, *Correll* v. *Thompson*, 63 F.3d 1279, 1291-92 (4th Cir. 1995), the case against Sherman is less than compelling. The evidence is largely circumstantial. The prosecution presented no eyewitnesses to the killings, no confession by Sherman, nor any evidence of gunpowder residue, tree sap, or pine needles on him. See *id.* (finding admission of defendant's confession harmless in light of co-defendant testimony, eyewitness accounts, and other testimony that defendant admitted involvement in crime).

Bearing all the considerations which must be taken into account, the error was not harmless. Granting a writ of *habeas corpus* does not necessarily set Sherman free.[9] If the state of Maryland elects promptly to retry him, a jury, acting properly, may well again convict. It also may not, however, for Sherman, like all criminal defendants, must be proven guilty beyond a reasonable doubt. But a subsequent trial, unlike the trial at issue, presumably would be conducted without harmful error, which is a basic objective of our judicial system.

Accordingly, the writ is granted, subject to the right of Maryland to retry Sherman on the charges of murder within six months of our adoption of this order.

WRIT GRANTED

WILKINSON, Circuit Judge, dissenting:

I respectfully dissent. It is clear that juror Miller's unauthorized visit to the crime scene constituted trial error, but it is equally clear that the error was harmless under the standard enunciated in *Brecht* v. *Abrahamson*, 113 S.Ct. 1710 (1993). See also *Smith* v. *Dixon*, 14 F.3d 956, 974-81 (4th Cir. 1994).

The district court, after thoroughly reviewing the evidence presented at trial, correctly concluded that the juror's site visit did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S.Ct. at 1722 (quoting

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[9] Sherman will remain in custody while the state decides whether to retry him. Only if he is not given a new trial within six months will he be released from custody pursuant to this order.

Kotteakos v. *United States*, 328 U.S. 750, 776 (1946)). First, the state offered powerful evidence at trial that Timothy Sherman killed his mother and stepfather. The murder occurred in the middle of the night when Timothy Sherman was home; there was no indication of forced entry, and the house was equipped with an alarm system. The murder weapon was a 12-gauge shotgun that belonged to the Shermans. Police discovered Timothy Sherman's fingerprints on the weapon's trigger mechanism and a box of 12-gauge shotgun shells under his mattress. The box itself contained only three shells, and police located two matching (the box held five) expended shells that experts concluded were fired from the murder weapon. Police found the shotgun lodged in the branches of a large tree, where Timothy Sherman had previously hidden objects and which is located between his own house and that of his grandparents where he ran to report the murder. It is true that there was no sign of gunpowder residue on Timothy Sherman and no pine needles or sap were found on his clothing. But against the powerful array of evidence presented at trial, these facts seem insubstantial.

Second, little prejudice could have resulted from the juror's visit to the crime scene. Juror Miller apparently traveled to the scene in order to see the hiding place for the weapon, even though aerial photo graphs of and testimony about the tree had been introduced into evidence. When the district court considered the prejudicial effect of the visit, it granted Sherman the benefit of several assumptions: "that Miller examined the tree, told the other jurors that he disagreed with the photographs, and concluded that it was possible for Sherman to hide the gun in the tree in the condition in which it was found." Even under these assumptions, however, the district court found that the error was harmless because substantial evidence demonstrated that Timothy Sherman hid the weapon in the tree. That evidence included photographs showing that Timothy Sherman had an opportunity to hide the weapon in the tree and testimony that he used the tree as a hiding spot and would have been physically able to wedge the gun in the tree. Given this context, the district court appropriately concluded that the juror's site visit "was cumulative of the detailed evidence presented at trial" about the neighborhood where the murder took place and the hiding place for the weapon.

In light of all the evidence presented at trial, Juror Miller's unauthorized excursion to the crime scene was harmless. *Brecht*, 113 S.Ct. at 1722; *Smith*, 14 F.3d at 979. I would affirm the judgment of the district court for the reasons set forth in its careful opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. WN-91-2006

TIMOTHY SCOTT SHERMAN, Petitioner,

v.

SEWALL B. SMITH, *et al.*, Respondents.

MEMORANDUM

NICKERSON, District Judge.

This case is before the Court on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner first filed his petition in July 1991. Senior United States District Judge Joseph C. Howard denied the petition on August 20, 1992. Petitioner appealed to the Court of Appeals for the Fourth Circuit, and by unpublished opinion dated October 27, 1993, the Fourth Circuit panel vacated Judge Howard's Order and remanded the case for further proceedings. *Sherman* v. *Smith*, No. 92-6947, slip op. at 6-7 (4th Cir. Oct. 27, 1993) (per curiam). The case was reassigned to the undersigned who held a hearing on the matter on June 17, 1994. Upon a *de novo* review of the entire record, the Court will deny the petition for a writ of habeas corpus.

I. BACKGROUND

This case has a long and arduous history, all of which need not be repeated here. Petitioner comes before this Court on a limited issue — whether one juror's unauthorized visit to the neighborhood where the crime occurred is grounds for the granting of habeas relief. In that light, the Court notes the following essential facts.

In May 1988, Timmy Sherman was tried and convicted in the Circuit Court for Harford County for the murders of his natural mother, Ann Sherman, and adopted father, Stevenson Sherman. He received two consecutive life terms of imprisonment. The murders occurred at approximately one o'clock on the morning of October 12, 1987. At approximately 1:30 a.m., Timmy arrived out

of breath and upset at the nearby home of his maternal grandparents, the Gibsons. There were no signs of forced entry into the Sherman house, and the house had an alarm system.

The evidence presented against Timmy included a 12-gauge shotgun with Timmy's fingerprints on the trigger mechanism. Two police officers, Hopkins and Harkins, found the gun lodged in a pine tree near the Gibson's house. The gun was deep inside the thick branches of the tree, with the barrel pointing downward toward the trunk of the tree and the butt of the gun up in the thicker portion of the branches. Other evidence presented against Timmy included a box of shells for a 12-gauge shotgun found under Timmy's mattress and two expended shells that experts determined were fired from the murder weapon. The box was designed to hold five shells but contained only three.

Timmy told police officers that he had been in bed at the time of the murders and that he heard his mother scream and two shots. He told them that he then ran out of the house to his grandparents' house. There was no evidence of gunpowder residue on Timmy, nor was there any evidence of pine needles or sap on his clothing.

At the beginning of the trial, Sherman requested a jury visit to the site, which was denied by the trial judge. Two or three days into the trial, one of the jurors, Blane Miller visited the neighborhood, which is known as Gibson Manor, with his wife. Having learned of this visit after the jury had rendered its guilty verdict, Sherman moved for a new trial. At the hearing on that motion, Miller testified: "I went to the Sherman house and then I drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." Transcript at 232. Miller explained that he was prompted to visit the area after several of the photographs of the tree had been introduced into evidence. "[T]he reason why I went there was so I could see the tree that was so much in

question." Transcript at 239.[1] The trial judge denied the motion for a new trial, stating:

> So there's no question that Mr. Miller had violated instructions which were given about not doing his own investigation. However, I am convinced that I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste of time and expense to take the jury out there because I felt the issue was fully covered. So that I think that that activity is not of such magnitude as to warrant a new trial or reversible appeal.

Transcript at 255.

Sherman appealed directly to the Maryland Court of Special Appeals, which upheld the conviction. Both the Maryland Court of Appeals and the United States Supreme Court denied certiorari. Sherman then filed a petition for a writ of habeas corpus in the Circuit Court for Harford County. The petition was transferred to the Circuit Court for Baltimore County, which denied it. The Court of Special Appeals affirmed, and again the Maryland Court of Appeals and the Supreme Court denied certiorari. In July 1991, Sherman filed his federal petition for a writ of habeas corpus, in which he argued several grounds for vacating his convictions. The case was before Senior United States District Judge Joseph C. Howard, who referred it to Chief Magistrate Judge Clarence E. Goetz for a Report and Recommendation. On the issue of Miller's visit to the Gibson Manor area, Judge Goetz deferred to the state court's determination and recommendation that the Court deny the petition. Judge Howard affirmed and adopted the Report and Recommendation. Sherman appealed to the United States Court of Appeals for the Fourth Circuit solely on the issue of Miller's visit. The Court of Appeals found that the district court improperly

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[1] Neither party asked Miller further details of his visit, such as, whether he got out of his car, examined the pine tree, reenacted parts of the crime or the flight, or timed the distance between the Sherman house and Gibson house. The restrictions on a juror's testimony, *see, e.g.*, Fed. R. Evid. 606(b); Maryland R. Evid 5-606(b), do not prohibit these questions. The trial judge prohibited only the question of why Miller went to the site. Transcript at 232-35, 238-39.

deferred to the state court's ruling rather than conducting its own *de novo* review. *Sherman* v. *Smith*, No. 92-6947, slip op. at 6 (4th Cir. Oct. 27, 1993). The Court of Appeals vacated Judge Howard's ruling and remanded the case for further determinations.[2]

On this second review of his federal habeas petition by a district court, Sherman urges this Court to determine that the error in this case — Miller's unauthorized visit to the Gibson Manor area — was so egregious and problematic that it mandates automatic reversal. In the alternative, Sherman argues that in light of all the evidence presented at trial, the error was prejudicial and warrants reversal of the jury's verdict.

II. DISCUSSION

At the outset, the Court notes that Miller's visit raises concerns about violation of the Sixth Amendment's confrontation clause. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a ... trial by an impartial jury ... and ... to be confronted with the witnesses against him."); *Valentin* v. *Snow*, No. JFK 83-2278, slip. op. (S.D.N.Y. August 13, 1985) ("There is little doubt that unauthorized visits by jurors to the scene of a crime implicate serious confrontation clause problems."). In reviewing this issue *de novo*, the Court must conduct a two-step analysis. First, it must address the question of whether the constitutional error was a "structural" error that mandates relief. If not, the error is deemed a "trial" error, and the Court must then inquire as to whether the error was harmless. As the Fourth Circuit opinion provided little guidance on the nature of the error in this case, the Court turns to the Supreme Court's jurisprudence.

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[2] As an alternative reason for vacating the district court's ruling, the Fourth Circuit indicated that the district court improperly placed the burden of proof on Sherman. *Sherman*, slip op. at 6; *id.* at 8 (Phillips, J., concurring) (noting the "majority's alternative holding that the State bears the burden of proving constitutional error harmless on federal habeas review.").

A. "Trial" Error or "Structural" Error.

The Supreme Court recently distinguished "trial" errors from "structural" errors in *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993). In *Brecht*, the habeas petitioner had been convicted of first degree murder and sentenced to life in prison. At the trial, the prosecution had impermissibly referred to petitioner's post-*Miranda* silence. The specific issue before the Court in *Brecht* was what standard applies in determining whether the prosecution's misconduct was a harmless error. *Id.* at 1713. Before turning to that issue, the Court characterized the nature of the constitutional error and in doing so, clarified the distinction between "trial" and "structural" errors.

A trial error "'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial.]'" *Id.* at 1717 (quoting *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1254 (1991)). By contrast, "'structural defects in the constitution of the trial mechanism ... defy analysis by "harmless-error" standards.'" *Id.* (quoting *Fulminante*, 111 S. Ct. at 1254). The Court explained that the existence of structural defects "requires automatic reversal of the conviction because they infect the entire trial process." *Id.* (footnote omitted). In *Brecht*, the Court determined that the prosecution's misconduct — impermissible references to the petitioner's post-*Miranda* silence — "squarely fits into the category of constitutional violations which we have characterized as a 'trial error.'" *Brecht*, 113 S. Ct. at 1717 (internal quotations omitted) (quoting *Fulminante*, 111 S. Ct. at 1249)).

The *Fulminante* case, which the *Brecht* Court relied upon, provides further clarification on the distinction. In *Fulminante*, the Court noted, 111 S. Ct. at 1265, several examples of structural error: total deprivation of the right to counsel at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); a judge who is not impartial, *Tumey* v. *Ohio*, 273 U.S. 510 (1927); unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez* v. *Hillary*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle* v. *Wiggins*, 465 U.S. 168, 177-78, n.8 (1984); and the right to a public trial, *Waller* v. *Georgia*, 467 U.S. 39, 49, n.9 (1984). Summarizing these examples, the Court explained that a

structural error is a defect in the framework of the trial rather than an isolated error that occurs during the trial. "Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 111 S. Ct. at 1265.

Miller's visit to the Gibson Manor area does not fall within the purview of the errors that the Supreme Court has characterized as "structural" errors. Like the prosecution's misconduct in *Brecht*, Miller's visit is properly characterized as a "trial" error. It was not a defect in the framework of the trial that "infect[ed] the entire trial process," *Brecht*, 113 S. Ct. at 1717. Rather, it was an solated error, the harm of which can be "quantitatively assessed in he context of other evidence presented." *Id.* See *United States* v. *Williams-Davis*, 821 F. Supp. 727, 740 (D.D.C. 1993) ("[U]unauthorized visits by jurors to the scene of the crime ... plainly fall[] in the category of exposure to extraneous information and should be analyzed accordingly.") (on a post-verdict motion for a new trial, analyzing the possibility of harm to the defendants caused by a jury visit rather than automatically granting a new trial). See also *United States* v. *Blevins*, 960 F.2d 1252, 1262 (4th Cir. 1992) (noting that there are a limited number of structural errors and that trial errors constitute the overwhelming majority of constitutional errors).

B. Harmless-Error.

Having determined that the error in this case was a "trial" error, the Court must determine whether the error was harmless. In *Brecht*, the Supreme Court determined that the standard for determining whether habeas relief must be granted is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 113 S. Ct. at 1714 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). The Court found that the *Kotteakos* standard was more suited to federal habeas review than the "reasonable doubt" standard articulated in *Chapman* v. *California*, 386 U.S. 18, 24 (1967) (an error is harmless only if the reviewing court finds "beyond a reasonable doubt" that the error "did not contribute to the verdict obtained"). The *Brecht* court explained: "The *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a

less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." *Brecht*, 113 S. Ct. at 1714.

Among the considerations underlying federal habeas corpus review noted by the *Brecht* Court are "comity and federalism." *Id.* at 1720. "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (internal quotes and citations omitted). In addition, the Court advised, "'The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.'" *Id.* at 1719 (quoting *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983)). Finally, the Court cautioned that, "an error that may justify reversal on direct appeal will not necessarily support collateral attack on a final judgment." *Id.* at 1720 (citation omitted).

Keeping in mind those considerations, this Court must determine whether in this case, Miller's visit to the Gibson Manor area "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. at 1714. See also *Smith* v. *Dixon*, 14 F.3d 956, 979 (4th Cir. 1994), ("[O]n collateral review in habeas, the reviewing court applies the harmless error standard announced in *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), to determine whether an error of the trial type is harmless.") (citing *Brecht*, 113 S.Ct. at 1721-22). As instructed by the Court of Appeals, the Court will analyze the issue of harmlessness under the assumption that the State bears the burden of proof.[3]

Sherman's argument centers around the pine tree in which the murder weapon was found. With his objections to Judge Goetz's

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[3] On April 4, 1994, the Supreme Court granted certiorari to determine who bears the burden of proof under *Brecht*. *O'Neal* v. *Morris*, 62 U.S.L.W. 3657, 3680 (1994) (No. 93-7407). Because the ultimate determination in this case — that the error was harmless — is favorable to the State even with it shouldering the burden, it is not necessary to await a final determination on the matter by the Supreme Court.

Report and Recommendation, Sherman submitted the affidavit of an alternate juror, Anthony Delfrate.[4] Delfrate stated that during a break in the trial, Miller informed the other jurors in the jury room that he had "driven to the development ... where Ann and Steve Sherman were killed." Delfrate Affidavit at ¶ 2. According to Delfrate, Miller stated that he went to the area "so everything would be clearer in his mind" and "specifically stated that he was not satisfied with the photographs of the tree." *Id.* Sherman surmises that when Miller went on his drive through the neighborhood, he got out of his car and examined the tree. Neither party pressed Miller for the particulars of his visit at the new trial hearing. See *supra*, n.1. Nevertheless, the Court will assume that Miller examined the tree, told the other jurors that he disagreed

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[4] Sherman has never presented this evidence before a state court. The State urges the Court to disregard this affidavit because Sherman has not exhausted his state remedies. See 28 U.S.C. § 2254(b). Sherman maintains that the affidavit should be considered here because it was not possible to bring it before state court. The record does not support that argument. While the trial court limited questioning at the hearing on the motion for a new trial, there has been no indication that the state habeas court refused to entertain such evidence. Because the affidavit presents new evidence not presented before a state court, the Court is disinclined to consider it. See *Boggs* v. *Bair*, 892 F.2d 1193, 1199 & n.2 (4th Cir. 1989), cert. denied, 495 U.S. 940 (1990). In *Boggs*, the petitioner argued in his habeas corpus petition that his confession, which was admitted at trial, was inadmissible because he was intoxicated when he gave it. *Id.* at 1199. In support of his habeas case, the petitioner submitted for the first time the affidavit of a physician stating his opinion as to the petitioner's level of intoxication at the time of his confession. The district court allowed the petitioner to present this evidence although he had not done so at trial or in the state habeas case. *Id.* at 1199, n.2. The Fourth Circuit did not agree: "We think that the affidavit ... was just as available at trial as it was in the federal court and was just as available in the state habeas case is it was in the federal court.... There must be a stopping point with respect to reopening factual matters in such records." *Id.* Preventing the reopening of factual matters that could have been resolved in state court is a concern of practicality as well as of federalism and comity. Nevertheless, this Court will consider Delfrate's affidavit as part of the record in its *de novo* review. Given the Court's final determination in the case, there is no prejudice to the State.

with the photographs, and concluded that it was possible for Sherman to hide the gun in the tree in the condition in which it was found. Even under those assumptions, the State has demonstrated that Miller's visit was harmless.

The record shows substantial evidence supporting the conclusion that Sherman hid the murder weapon in the tree. There were several aerial photographs demonstrating that the tree was located on the Gibsons' property and was on the route from the Shermans' house to the Gibsons' house. There was evidence that the tree was a notorious neighborhood hiding spot and that Timmy had placed objects in it on prior occasions.

Officer Hopkins, who found the gun with Officer Harkins, testified that Harkins held the branches open while Hopkins retrieved the gun. Hopkins further testified that with his size and stature, 210 pounds, he would have had difficulty putting the gun inside the tree in the position it was found. Timmy at the time was about six feet in height and weighed approximately 130 pounds. Hopkins clarified his testimony, explaining that strength would not have been necessary to place the gun in the tree: "I would not say someone had to be strong, but had to be forceful to put it in the tree." Transcript at 141. The State introduced a black and white photograph of the tree which supplemented Hopkins' testimony regarding the thickness of the tree and the difficulty a large person would have had in lodging the gun in it.

Given the strength of the evidence supporting the factual conclusion that Sherman would have been able to — and did — hide the murder weapon in the pine tree, Miller's visit was harmless. Anything he learned from his outing was cumulative of the detailed evidence presented at trial regarding the Gibson Manor area and the tree that was "so much in question." The Court therefore concludes that Miller's visit did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. at 1722. Nor does it warrant the "extraordinary remedy," *id.* at 1719, of a writ of habeas corpus.

III. CONCLUSION

The Court determines that Miller's unauthorized visit to the neighborhood where the murders occurred was not a "structural" error. The Court further determines that as a "trial" error, the

State has demonstrated that Miller's visit was harmless as defined by *Brecht*. Accordingly, the Court will deny Sherman's petition for a writ of habeas corpus. A separate order will issue.

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 8th day of July, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That Petitioner's Petition for a Writ of Habeas Corpus BE, and the same hereby IS, DENIED; and

2. That the Clerk of the Court mail copies of the foregoing Memorandum and this Order to all counsel of record.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 92-6947

TIMOTHY SCOTT SHERMAN, Petitioner-Appellant,

v.

SEWALL B. SMITH, Warden, Maryland Penitentiary;
J. JOSEPH CURRAN, JR.,
Attorney General for the State of Maryland,
Respondents-Appellees.

Argued: May 5, 1993.

Decided: October 27, 1993.

ARGUED: Andrew Lewis Frey, Mayer, Brown & Platt, Washington, D.C., for Appellant. Ann Norman Bosse, Assistant Attorney General, Office of the Attorney General, Baltimore, Maryland, for Appellees. ON BRIEF: Roy T. Englert, Jr., James G. Duncan, Mayer, Brown & Platt, Stuart H, Robinson, Bel Air, Maryland, Washington, D.C., for Appellant. J. Joseph Curran, Jr., Attorney General of Maryland, Office of the Attorney General, Baltimore, Maryland, for Appellees.

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PER CURIAM:

Timothy Sherman was convicted of murdering his parents and currently is incarcerated in the Maryland Penitentiary in Baltimore. On petition for a writ of *habeas corpus*, he has challenged his conviction on the ground that his constitutional rights were violated by a juror's unauthorized and unsupervised visit during his trial to the crime scene. Upon the district court's denial of a writ, Sherman filed a timely notice of appeal.

At approximately one o'clock in the morning of October 12, 1987, Ann and Stevenson Sherman were murdered in their sleep,

each killed by a single shotgun blast. Eighteen-year-old Timothy Sherman, Ann's natural son and Stevenson's adopted son, reported that he had been in bed when he heard a single shotgun blast, his mother's screams, and then another shotgun blast followed by silence. He ran to the nearby house of his maternal grandfather, William Gibson, arriving at approximately 1:30 a.m. Gibson testified that "Timmy" was "very much out of breath and upset," that he had been crying, and that it took some time for him to calm down enough to explain what had happened. The two returned to the Shermans' house, where Gibson entered Ann and Stevenson Sherman's bedroom and discovered that they were dead. Gibson told his grandson that his parents were dead, causing him to cry again. The grandfather then called other family members and the police. Almost immediately the house filled with people — paramedics, police, family, and even the press.

In their investigation on the day of the murder, the police made two discoveries which were to be the basis of the State's case charging Timothy Sherman with the murder of his parents. First, two deputies, with the aid of a trained dog, found a Stevens 12-gauge shotgun that belonged to the Shermans tightly lodged in a pine tree near the grandparents' house. An examination of the weapon revealed that it had fired the two shells found in the hallway outside Ann and Stevenson Sherman's bedroom. Additionally, a fingerprint on the weapon matched that of Timothy. At trial, the prosecution theorized that the location of the weapon pointed toward Timothy's guilt as he had once used the tree as a hiding place.

The second piece of evidence introduced by the prosecution against Timothy was a box of Remington 12-gauge shotgun shells which was found under the mattress of Timothy's bed. The box, which was designed to hold five shotgun shells, contained three shells that matched the two expended shells found outside the victims' bedroom.

Those two pieces of evidence represented the case against Timothy. The State did not introduce any evidence of motive. In addition, two tests of Timothy's hands for gunpowder residue — one a highly sophisticated neutron activation test — which were taken only hours after the shooting failed to reveal any evidence to support the State's case. Likewise, his clothes tested negative for

gunpowder residue and no blood was found on any of his clothes, on his person, or in his bedroom. The lack of gunpowder residue was especially notable because a heavy accumulation of residue was found in Timothy's parents' bedroom.

Timothy also has noted weaknesses in the two pieces of circumstantial evidence which the prosecution relied upon. The State introduced nothing besides the location of the box of shells to establish that it was Timothy Sherman who placed the box under his bed. The box was discovered after many people had been in the house, and thus it was theoretically possible that someone else placed it under Timothy's mattress. The police had not tested the box for fingerprints, so none were introduced.

The key evidence appeared to be the shotgun and its location. Regarding the presence of his prints on the murder weapon, Timothy previously reported to the investigating officers on the morning of the shooting that he had fired the gun the day before the murder, and an FBI fingerprint expert testified at trial that another person could have used the gun without leaving any prints or removing prints that had been left on the gun within the preceding days.

As to the location of the weapon, trial witnesses testified that the pine tree was a well-known neighborhood hiding place. More important, perhaps, was the testimony of the two police officers who removed the gun from the tree. Corporal Hopkins, a strong six-footer, testified that the shotgun was so forcefully lodged in the tree that he "would have had difficulty putting the gun inside the tree in the condition [he] found it." Hopkins weighed 210 pounds, Timothy Sherman 130. In addition, the investigating officers discovered no evidence of pine needles or pine tar on Timothy the day after the murders.

Less than one year after the murder of his parents, Timothy Sherman went on trial before a jury in Harford County, Maryland. In its case-in-chief, the prosecution presented extensive evidence describing and otherwise concerning the pine tree where the murder weapon was found and the surrounding property. The State sought to demonstrate that it was possible for Timothy to commit the murders, remove all traces of gunpowder from himself and his

belongings, hide the shotgun in the tree, and run to his grandfather's house.

The State showed the jury a videotape of the outside of the Sherman house and the surrounding property, aerial photographs showing the relative locations of the Gibson house, the Sherman house, and the pine tree, several photographs of the tree, and testimony of both neighbors and police officers regarding the tree and the property. After the State had introduced most of that evidence and after the trial judge denied a motion by Timothy for a jury visit to the site, one member of the jury, unbeknownst to the trial court or the parties, decided to visit the neighborhood and inspect the site.

Juror Blane Miller revealed subsequent to the trial that a few days into the trial, he had driven, accompanied by his wife, "to the Sherman house and then [ ] drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." Miller testified at a post-trial hearing that he had never been in that neighborhood before but had determined its location from the evidence presented at trial and that he found the tree but did not leave his car more closely to inspect it. He acknowledged, however, that as a juror he had received the jury handbook which instructed jurors not to speak with others regarding the case or consider evidence other than that presented in the court room. Although the state trial judge would not allow Miller to be questioned regarding either his reasons for visiting the site or the possible influence the site visit had on jury deliberations, Miller did indicate during the hearing that he inspected the scene because he wanted to see "the tree that was so much in question."

At the conclusion of the trial, the jury convicted Timothy Sherman of two counts of first degree murder. Based on Miller's revelation, however, defense counsel made a motion for a new trial. Timothy Sherman argued to the trial court that the site visit by Miller violated his Sixth Amendment rights and justified a new trial. The state trial court when reviewing Sherman's challenge simply relied on its past ruling that a jury site visit was unnecessary and thereby concluded that any such visit was extraneous and irrelevant:

> I'm convinced that I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste of time and expense to take the jury out there because I felt the issue was fully covered.

The state trial judge failed to make an independent determination or to require the prosecution to explain why the admittedly constitutional error was harmless. Instead, he simply placed the burden of proof on Sherman and relied on his own previous ruling without investigating whether the error was structural, *i.e.*, one of law, or merely a trial error. See *Sullivan* v. *Louisiana*, 113 S.Ct. 2078, 2082-83 (1993). The trial court then sentenced Timothy Sherman to two consecutive terms of life imprisonment.

On its direct review of Sherman's conviction, the Maryland Court of Special Appeals deferred to the trial judge's discretion. In addition, that court also assumed the burden of proof was on Sherman: "Sherman's bald averment fails to indicate how the juror's improper action prejudiced the case." The Court of Special Appeals of Maryland upheld the conviction.

Both the Maryland Court of Appeals and the United States Supreme Court denied Timothy Sherman's requests for a *writ of certiorari*, although Justices White and Marshall would have granted *cert*. Having exhausted his post-conviction relief in the Maryland courts, Timothy Sherman sought a *writ of habeas corpus* from the United States District Court for the District of Maryland.

The district court referred the case to a magistrate judge who recommended that the *writ* not be granted. In his Report and Recommendation, the magistrate judge concluded, as an initial matter, that Sherman bore the burden of proving that the error was not harmless. Next, the magistrate judge, taking the position that Timothy had to meet the clearly erroneous standard, accepted the state court's conclusion that Sherman failed to prove that the juror's site visit was not harmless. The district judge, in a one-page memorandum and order, adopted the magistrate judge's report.

The district court relied also on answers to questions which had not actually been investigated. It, therefore, may have imposed an improper standard of review on Timothy with regard to the state court's determination of harmlessness and may improperly have placed the burden of showing the error was not harmless on the

defendant. The Supreme Court has ruled consistently that habeas courts must review the entire record *de novo* in determining whether a trial error affecting substantial rights influenced jury deliberations and that the burden of showing harmlessness rests with the state. See *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

Recently, the Supreme Court employed *de novo* review in a case in which it concluded that *Kotteakos* governed federal *habeas corpus* determinations of whether constitutional error of trial type was harmless. *Brecht* v. *Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710 (1993); see also *Wright* v. *West*, ___ U.S. ___, 112 S.Ct. 2482, 2492-2493 (1992) (engaging in *de novo* review); *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Therefore, perhaps, the district court, in reviewing Sherman's constitutional challenge, should have first decided whether the question was one of law, *i.e.*, subject to *de novo* review. See also *United States* v. *Thompson*, 744 F.2d 1065, 1068 (4th Cir. 1984) (reviewing *de novo* an alleged violation of right to an impartial jury).

The Supreme Court also held in *Kotteakos* that burden of proof is on prosecutors to explain why trial errors were harmless. Justice Rutledge, writing for the Court, plainly states that unless an error is merely "technical", the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution. *Kotteakos*, 328 U.S. at 760-761. Here, there has been no decision as to whether or not the error was merely technical. As Justice Stevens notes in his concurrence in *Brecht*, "[a] constitutional violation, of course, would never fall in [Rutledge's] 'technical' category." *Brecht*, ___ U.S. ___, 113 S.Ct. at 1723-1724 (Stevens, J. concurring).

Because the district court erred in not reviewing the entire record *de novo* to answer questions as to the nature of the error — structural or trial — and whether it was technical or not, and, depending on the answers to those queries, whether the error influenced the jury's deliberations, with the burden on prosecutors to explain why trial errors were harmless, we vacate the district court's order and remand for further findings in accord with *Kotteakos*.

VACATED AND REMANDED

PHILLIPS, Circuit Judge, concurring in part and concurring in the judgment:

I agree with the majority that a state court's finding that a federal constitutional error is harmless is not a "finding of fact" entitled to a presumption of correctness on federal habeas review under 28 U.S.C. § 2254(d); that, instead, the issue of harmlessness is a mixed question of law and fact reviewable *de novo* on federal habeas. See *Dickson* v. *Sullivan*, 849 F.2d 403, 405 (9th Cir. 1981); *United States ex rel. Savory* v. *Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987); *Lacy* v. *Gardino*, 791 F.2d 980, 986 (1st Cir.), cert. denied, 479 U.S. 888 (1986); *cf. Miller* v. *Fenton*, 474 U.S. 104 (1985) ("voluntariness" of confession is a mixed question of law and fact entitled to *de novo* review on federal habeas); see also *Wright* v. *West*, 112 S.Ct. 2482, 2491-92 (1992) (declining invitation to overrule *Miller* and apply 2254(d) presumption of correctness to mixed questions of law and fact). I also agree that in denying habeas relief here, the magistrate judge failed to conduct a *de novo* inquiry into the harmlessness of the found Sixth Amendment error, but instead improperly deferred to the state court's prior determination that the error was harmless. Because I think that error alone merits our vacating and remanding here, I concur in the judgment.

I write separately, however, because of doubt about the soundness of the majority's alternative holding that the State bears the burden of proving constitutional error harmless on federal habeas review. That surely has been the rule until recently, and it may still be. But the Supreme Court's recent decision in *Brecht* v. *Abrahamson*, 113 S.Ct. 1710 (1993), casts enough doubt on its continued validity that I think we should simply stay away from it as an alternative ground of decision.

The principal issue in *Brecht* was what standard should be used to decide whether constitutional error may be disregarded as harmless on federal habeas: the stringent standard of *Chapman* v. *California*, 386 U.S. 18, 24 (1967) (error is harmless only if reviewing court can say, "beyond a reasonable doubt," that the error "did not contribute to the verdict obtained"), or the relatively more forgiving standard of *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946) (error is harmless unless reviewing court can say that it "had a substantial and injurious effect or influence in

determining the jury's verdict"). The Court held that while the *Chapman* standard applies to most constitutional errors on direct review, the more lenient *Kotteakos* standard should apply to those same errors on federal habeas review, because it is "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying this Court's recent habeas jurisprudence." *Id.* at 1722.

The majority here assumes that in adopting *Kotteakos*'s harmlessness *standard* for use in federal collateral review, the *Brecht* Court also intended to adopt *Kotteakos*'s separate holding that the burden of proving a particular error harmless under that standard rests with the State. Slip op. at 6. With all respect, I am not so sure that *Brecht* can be read to do this. It is true that the *Brecht* majority did not specifically consider the question of who bore the burden of proof with respect to harmlessness on federal habeas. But Chief Justice Rehnquist, writing for a majority of five, used language that strongly suggested the Court intended to place that burden on the habeas petitioner, rather than the State. See 113 S.Ct. at 1722 (under the newly-adopted *Kotteakos* standard, "habeas petitioners ... are not entitled to habeas relief based on trial error unless *they* can establish that it resulted in 'actual prejudice.'") (emphasis added). Three of the four dissenters specifically read that language as a deliberate re-casting of the burden of proof with respect to harmlessness from the State to the habeas petitioner. See 113 S.Ct. at 1735, 1727 (White, J., joined by Justice Blackmun and by Justice Souter, in relevant part, dissenting) ("the Court now invokes *Kotteakos* ... *to impose on the defendant the burden of establishing that the error 'resulted in actual prejudice'*") (emphasis added). Only Justice Stevens, who joined the Chief Justice's opinion for the Court but also wrote a separate concurring opinion, indicated that he understood the Court's adoption of the *Kotteakos* standard to leave the burden of showing harmlessness "on prosecutors." 113 S.Ct. at 1723 (Stevens, J., concurring).

Because Justice Stevens provided the critical fifth vote to affirm the judgment below, I suppose we might read his concurrence as controlling on the burden-of-proof question. But I think this runs an unnecessary risk here, for several reasons. First, Justice Stevens *also* joined the majority opinion, with its contrary

suggestions about the location of the burden of proof. Second, Justice Stevens' remark that the burden of proof would remain on prosecutors seems more one made in passing than an explicit expression of disagreement with the contrary intimations in the majority opinion. Finally, Justice White's reading, in dissent, of the majority opinion — as adopting a different rule on the cast of the burden of proof on harmlessness for federal habeas review than applies on direct review — is more consistent with the obvious design of recent decisions of the Court confining the scope of federal collateral relief and emphasizing that it is not automatically available simply because a petitioner has proved an error that might merit reversal on direct appeal.[1] For these reasons, I think that in prudence, whatever we may think of the rule, we should assume that the *Brecht* Court meant exactly what its majority opinion said: that the habeas petitioner has the burden of proving a constitutional error prejudicial — *i.e.*, not harmless — under the *Kotteakos* standard.[2]

Because I think it unwise and unnecessary to rest decision on the burden of proof point, the improper deference basis being

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[1] See, *e.g.*, *Teague* v. *Lane*, 489 U.S. 288 (1989) (although new rules of law have retroactive application in criminal cases on direct review, they seldom do on federal habeas); *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987) (although a criminal defendant has a constitutional right to counsel on direct appeal, he has no such right on federal habeas); *United States* v. *Frady*, 456 U.S. 152 (1982) (while the federal "plain error" rule applies in determining whether a defendant may raise a claim for the first time on direct appeal, the stricter "cause and prejudice" standard applies in determining whether that same claim may be raised on federal habeas); *Stone* v. *Powell*, 428 U.S. 465 (1976) (*Mapp* claims are not cognizable on federal habeas, even when they might merit reversal on direct review).

[2] In this connection, it may be appropriate to note that under legislation currently pending in Congress, 28 U.S.C. § 2254(d) would be amended to make clear that the State bears the burden of persuading the court that constitutional error was harmless on federal collateral review. H.R. 3131, 103rd Cong., 1st Sess. § 303 (1993) (amending 28 U.S.C. § 2254(d) to add that on federal *habeas*, "[i]n the case of a violation that can be harmless, the State shall bear the burden of proving harmlessness").

sufficient, I do not join those portions of the majority opinion discussing allocation of the burden of proof.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. JH-91-2006

TIMOTHY SCOTT SHERMAN, Petitioner,

v.

SEWALL B. SMITH, et al., Respondents.

MEMORANDUM AND ORDER

HOWARD, Senior District Judge.

The court has made a *de novo* review of the Report and Recommendation of Chief United States Magistrate Judge Clarence E. Goetz, dated February 13, 1992, the record, the objections filed by petitioner, the respondent's response, and petitioner's reply.

The Court has also reviewed the Supreme Court's recent ruling in *Wright* v. *West*, 112 S.Ct. 672 (1991) (No. 91-542) in which the Court considered, *inter alia*, the standard of review to be applied by a federal court to a habeas corpus claim involving a mixed question of law and fact. The Court finds that Chief Magistrate Judge Goetz properly relied upon *Sumner* v. *Mata*, 455 U.S. 591 (1982) and *Near* v. *Cunningham*, 313 F.2d 929 (4th Cir. 1963) in determining the standard of review applicable to a juror's visit to the crime scene during trial.

Accordingly, it is this 20th day of August, 1992, by the United States District Court for the District of Maryland;

ORDERED:

(1) that Chief Magistrate Judge Goetz's Report and Recommendation BE, and the same hereby IS, ADOPTED;

(2) that petitioner Sherman's petition for habeas corpus BE, and the same hereby IS, DENIED, and

(3) that the Clerk of the shall mail copies of this Memorandum and Order to all counsel.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. JH-91-2006

TIMOTHY SCOTT SHERMAN, Petitioner,

vs.

SEWALL B. SMITH, et al., Respondents.

REPORT AND RECOMMENDATION

GOETZ, Chief Magistrate Judge.

Petitioner, Timothy Scott Sherman, is incarcerated in the Maryland Penitentiary in Baltimore, Maryland. Through counsel, he has filed a petition for a writ of habeas corpus.

Sherman seeks to challenge his conviction in the Circuit Court for Harford County, on June 7, 1988, on two counts of first degree murder. A motion for a new trial was filed on June 16, 1988. (Paper No. 7, Exhibit 4). The motion was denied after a hearing on September 2, 1988, and the petitioner was sentenced on the same day to life imprisonment on each count, the sentences to run consecutively.

Sherman appealed to the Court of Special Appeals. (Paper No. 7, Exhibit 8). The judgments below were affirmed in an unreported *per curiam* opinion issued May 16, 1989. (Paper No. 7, Exhibit 10). The appeals court denied a motion for reconsideration ind further argument by order dated June 28, 1989. (Paper No. 7, Exhibit 12). A petition for a writ of certiorari was denied by the Maryland Court of Appeals without opinion on October 20, 1989 (Paper No. 7, Exhibit 14), and that court denied a motion for reconsideration on January 10, 1990. (Paper No. 7, Exhibit 16). on October 29, 1990, the Supreme Court of the United States denied a petition for a writ of certiorari. (Paper No. 7, Exhibit 18).

Sherman filed a petition for post-conviction relief on May 9, 1990 (Paper No. 7, Exhibit 19) and a supplement to that petition on August 23, 1990. (Paper No. 7, Exhibit 20). After two days of hearings (Paper No. 7, Exhibits 21-24) in the Circuit Court for

Baltimore County, to which the case had been transferred upon the recusal of the judges of the Circuit Court for Harford County, the petition was denied in a written opinion filed October 29, 1990. (Paper No. 7, Exhibit 26). A motion to alter or amend judgment was denied (Paper No. 7, Exhibit 28, 30) and Sherman filed an application for leave to appeal (Paper No. 7, Exhibit 31) which was denied by the Court of Special Appeals in an unreported *per curiam* opinion April 18, 1991. (Paper No. 7, Exhibit 32). A petition for a writ of certiorari was denied by the Court of Appeals on jurisdictional grounds by an order dated August 5, 1991. (Paper No. 7, Exhibit 34).

The petition *sub judice* was filed July 17, 1991. The grounds alleged, in the order in which they will be addressed herein, are:

1. That the post-conviction court blocked the presentation of evidence in post-conviction proceedings as to the trial judge's pre-deliberation contacts with the jury, thereby violating Sherman's right to due process of law.

2. That the trial judge visited the jury prior to and during deliberations, without the knowledge of defense counsel, and made remarks to the jurors which had the potential for coercing their judgment.

3. That a juror, during trial, made an unauthorized visit to the crime scene, thereby denying Sherman a fair trial. Moreover, the courts erred by placing on petitioner the burden of showing prejudice from this unauthorized visit.

Sherman has been convicted of murdering his parents in their bed in the family home in Harford County in October of 1987. He was 18 years of age at the time. His parents were killed by two shotgun blasts at about 1:00 a.m. Police testified at trial that Sherman told them on the night of the slayings that he was in bed in an adjacent room when he heard a shot, then heard his mother scream, then heard another shot. (Paper No. 7, Exhibit 3, Tr. 5/24/88, at 94 and 141). Sherman ran to the nearby home of his maternal grandparents and his grandfather called the authorities. Two spent shotgun shells were found in the hall outside the decedents, bedroom and a box of like shells, with two missing from the box, was found under Sherman's mattress in his bedroom. There was no evidence of any forced entry or theft. Later that day

the police found a shotgun belonging to the Shermans, which subsequently was determined to be the murder weapon, lodged in a pine tree on the family property. The tree, which testimony revealed to be a neighborhood hiding place, and the position of the weapon in the tree turned out to be a subject of substantial testimony, argument and speculation during the trial. As it turns out, the tree survives as a source of controversy. One of the jurors, curious about the tree, drove with his wife during the trial to the property to have a look at it and this extrajuridical adventure is the subject of one of Sherman's claims of error referenced above.

The other claims regard purported visits to the jury room by the trial judge wherein he is alleged to have exhorted the jurors, essentially, to reach a verdict and reach it fast because the trial was costing the taxpayers a lot of money.

Taking up petitioner's first claim, the undersigned notes that claims of error in state post-conviction proceedings cannot serve as a basis for federal habeas corpus relief. *Bryant* v. *Maryland*, 848 F.2d 492 (4th Cir. 1988). Specifically, here, the post-conviction court held that the Court of Special Appeals had fully considered the issue of the trial judge's purported predeliberation contact with the jury and therefore was outside the jurisdiction of the post-conviction court under Maryland Annotated Code art. 27 § 645A, which code section establishes the parameters of post-conviction proceedings. Regardless of the merits of the underlying issue, which will be taken up below, this jurisdictional ruling in a collateral proceeding is not subject to review here. Accordingly, the petition must be denied as to that ground.

As to Sherman's claim that the trial judge had impermissible contacts with the jury during deliberations, the post-conviction court heard testimony from several jurors and the trial judge and concluded as a matter of historical fact that the complained-of conduct simply did not occur. The trial judge denied it utterly, and his testimony was corroborated by the foreman of the jury. Three jurors, on the other hand, testified to their recollections that the trial judge stood at the jury room door and said *inter alia* that the trial had been expensive and he did not want a hung jury. The judge of the post-conviction court, in a wellarticulated opinion setting forth the basis for his findings of fact, believed the trial judge and the jury foreman and disbelieved the other jurors. On

habeas corpus review, this finding of historical fact is presumed to be correct. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. 539 (1981). The undersigned cannot say that the findings of the post-conviction court are not fairly supported by the record nor has the petitioner established convincing evidence that the court's factual findings were erroneous. *Id.* at 550. Accordingly, the claim that Sherman's trial was tainted by the court during jury deliberations must be denied.

Sherman alleges further that the trial was tainted by one or more pre-deliberation contacts with the jury by the trial judge. There appears to be little question that prior to jury deliberations the trial judge had one or more contacts with the jury outside the presence of counsel. The nature and import of those contacts is somewhat less clear. The issue was raised first as part of a motion for a new trial. (Paper No. 7, Exhibit 4). That motion was the subject of a hearing by the trial judge on September 2, 1988, at which Sherman presented testimony from juror Blane Miller, who also happens to be the juror whose out-of-court meanderings will be treated below. Mr. Miller testified, in pertinent part, as follows about a visit to the jury by the trial judge:

> A. .....What he did, come back and we were getting ready to go to the motel, and somehow along the line, and I don't know the exact words, we were talking about the motel, and the overnight stay, and it came back as, you know, and he said that, you know, this was his first time, to bear with him, and he would work with us with the overnight stay, and then it was something said to the effect of the cost of or burden, cost of the taxpayers.
>
> Q. What did he say, if anything, about the burden?
>
> A. Well, he didn't want another night burden on the taxpayers in so many words is the way it came out.
>
> Q. Did Judge Whitfill actually say that to you and the jury?
>
> A. Well, there's a lot of things going on at that point. It came out of Judge Whitfill's mouth, you know, somewhere in this line, yes.
>
> * * * *

Q. Are you absolutely certain in your mind that was said to you? I know you're paraphrasing words, but that this is the first time, et cetera?

A. Well, I'm putting the words that I understood and, you know, that's what it came out to be.

Q. What was that again?

A. That, you know, he didn't want another night motel burden on the taxpayers, and, you know, I would like to finish by saying I don't think that it was something, you know, that he was serious about.

(Paper No. 7, Exhibit 7, p. 22-23)

Subsequent to this testimony at the hearing, the trial judge made the following statement for the record:

THE COURT: Okay. I propose to make a statement as to the sequence of events that occurred because the Motion having been filed, I have gone back and done some review of my own files reviewed the transcripts and also just to refresh my recollection. The last trial day before the jury started to deliberate, I had a conference in chamber with Counsel, discussed that I should, whether or not I should alert the jury that they might have to stay overnight. We agreed that was the prudent thing to do. I asked counsel whether or not they wanted that on the record, and in open court, and was advised by Counsel that they did not see it to be necessary.

I went there — I went to the jury room door and told the jury to bring a bag and be prepared to stay overnight, to tell their families that they might have to stay overnight; told them that it wasn't certain that they would, but they should be prepared.

One of members of the jury asked a question of how late would they work, and I had told them that that part was up to the jury; that 6:00 o'clock was a time in which we would have to make a decision as to whether or not to hold motel space or not to hold motel space.

Some juror, again I couldn't tell you who, had asked who had to pay for the motel rooms. And I told them that the County or taxpayers would be paying for the motel rooms, and

> I did make a comment that I would be asking the question or (sic] how they stood on deliberations around 6:00 o'clock sometime so as to know whether or not to hold the motel rooms or not to hold them, and that I wouldn't want to waste taxpayers' money, and there was some comment to that which I don't recall. I had then said to the jury that in terms of costs of this trial, the costs of the motel was minimal and that that was not a concern and not something to be worried about.

(Paper No. 7, Exhibit 7, p. 42-44)

The judge denied the motion for a new trial.

On appeal, the Court of Special Appeals noted that it is better practice for judges to limit contact with the jury for fear that an innocent remark might be misinterpreted and disadvantage one or other of the parties. While considering the trial judge's comment in this case to have been ill-advised, the appeals court failed to see how it could have prejudiced Sherman's case and determined that if there was error it was harmless beyond a reasonable doubt. (Paper No. 7, Exhibit 10. p. 11-12). Obviously, then, the appeals court was of the opinion that the trial judge's action did not rise to the level of constitutional error, but, covering all bases, it held that such error would be harmless if it existed. On review here, the undersigned again must give a presumption of accuracy to the trial judge's finding as to what he said to the jury. *Sumner* v. *Mata*, *supra*. Certainly the muddled testimony of juror Miller cannot be deemed to establish that the trial judge made statements generating constitutional error. Rather, the predeliberation remarks of the trial judge appear to the undersigned to have been innocuous. Not every *ex parte* communication between the trial judge and the jury is of constitutional dimension. *United States* v. *Gagnon*, 470 U.S. 522 (1985). In short, the undersigned finds no constitutional error in the actions of the trial judge, but if, in the alternative, such error were to be found, the undersigned would agree it would be harmless beyond a reasonable doubt. Of no small significance is the fact that there was no evidence before the appeals court of any rush to judgment by the jury based upon the remarks of the trial judge, whatever those remarks may have been. To the contrary, the jury *was* sequestered overnight before reaching a verdict the next day. Given the strength of the case against Sherman and the absence on appeal of evidence that the jury was tainted by illicit

contact with the trial judge, there is clearly no merit to this contention.

Finally, Sherman asserts that juror Miller's private investigation of the crime scene denied him a fair trial and, further, that the Court of Special Appeals failed to give Sherman the benefit of a presumption that such activity by a juror is fatal to a fair trial. Like the issue of the court's contacts with the jury, this issue was first raised by Sherman as part of his motion for a new trial and was denied by the trial court.

The appellate court, relying upon *Wernsing* v. *General Motors Corp.*, 298 Md. 406, 419-420 (1984), held that in the absence of direct evidence as to the effect of extraneous matter on jury deliberations the court must look to the probability of prejudice from the extraneous matter in the particular case. Sherman, on the other hand, argues that the fact of juror Miller's misadventure is sufficient, in and of itself, to generate a presumption of jury taint and the government must carry the burden of proving that the effect of his action was harmless. *United States* v. *Barnes*, 747 F.2d 246 (4th Cir. 1984); *Stockton* v. *Virginia*, 852 F.2d 740 (4th Cir. 1988), cert. denied, 489 U.S. 1071 (1989). There is, however, a caveat to the generation of this presumption, as recognized by Sherman in his supporting memorandum (Paper No. 1, P. 20), *i.e.*, that there must have been extrinsic evidence placed before the jury which had a reasonable possibility of influencing the verdict. In this case, the trial court, in considering the issue of juror Miller's travels on the motion for a new trial, noted that the court had denied a motion made by the defense during trial for a jury visit to the crime scene. The basis for that ruling, the trial judge said, was the fact that there was substantial photographic evidence (including videotape, still photos and aerial photos) of the crime scene presented at trial and that a view of crime scene would be a waste of time and expense, inasmuch as it had been fully covered in court. The court found that assessment to apply with equal force to the question of whether the juror's actions bore a reasonable possibility of influencing the verdict and concluded that it did not. (Paper No. 7, Exhibit 7, p. 63-64). The trial court, of course, was in a unique position to make such an assessment as to the cumulative effect of the crime scene evidence and, once again, fact-finding determinations of this type by state courts are entitled to

great deference on habeas corpus review. *Sumner* v. *Mata*, 449 U.S. 539 (1981).

Accordingly, for the reasons set forth above, it is the recommendation of the undersigned that the petition for a writ of habeas corpus be denied as to this last ground and as to all other grounds raised therein.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. 89-1580

TIMOTHY SCOTT SHERMAN, Petitioner,

v.

STATE OF MARYLAND, Respondent.

Petition for writ of certiorari to the Court of Special Appeals of Maryland.

Oct. 29, 1990. Denied.

Justice WHITE and Justice MARSHALL would grant certiorari.

APPENDIX G

COURT OF APPEALS OF MARYLAND

Petition Docket No. 285

TIMOTHY SCOTT SHERMAN, Petitioner,

v.

STATE OF MARYLAND, Respondent.

September Term, 1989

(No. 1491, September Term, 1988 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers and conditional cross-petition filed therein the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 20, 1989

APPENDIX H

UNREPORTED

COURT OF SPECIAL APPEALS OF MARYLAND

No. 1491

SEPTEMBER TERM, 1988

TIMOTHY SCOTT SHERMAN

v.

STATE OF MARYLAND

Gilbert, C.J.
Bishop,
Wenner,

JJ.

PER CURIAM

Filed: May 16, 1989

Timothy Scott Sherman was convicted by a jury in the Circuit Court for Harford County (Whitfill, J.) of the shotgun murders of his parents. Sherman was sentenced to two consecutive life sentences.

In his appeal to this Court, Sherman raises a virtual multitude of issues for our review. We shall discuss them in the order posited to us by Sherman, supplying whatever factual predicate is needed to understand the point.

"I. Did the trial court commit reversible error in admitting the prosecution's state of mind evidence?"

Over objection, Cynthia Benjel, a State's witness, testified that Sherman told her four months prior to his parents' deaths that he had seen his parents killed in an automobile accident." Sherman related to Ms. Benjel that he was traveling in the "car behind them, and had seen their car hit and they were killed...." Another witness, Albert Unkart, told the court that Sherman made a similar remark to him ten days before the homicides. Sherman said that his "folks were killed in an auto accident in front of him." That testimony was presented to demonstrate Sherman's state of mind at the time of the double murder.

Sherman's statements to Unkart and Benjel were not offered for the truth of the matter asserted but were offered as circumstantial evidence of Sherman's state of mind at the time of the slayings. When declarations are simply the circumstantial predicate from which the state of mind may be inferred, they are deemed to be non-hearsay. *Santoni* v. *Moodie*, 53 Md. App. 129, 149-50 (1982).

We are convinced that Sherman's conversations with both Unkart and Benjel were irrelevant. The remarks merely proved that Sherman lied when he stated that his parents were killed in an automobile accident. A rational inference that Sherman was contemplating the violent death of his parents cannot be drawn from the statements. Therefore, the trial judge erred in admitting the evidence.

Nevertheless, in light of the overwhelming evidence against Sherman, the error does not warrant reversal. That evidence against young Sherman included a box, designed to hold five 12-gauge shells yet containing just three, which was found beneath

Sherman's bed. The three shells were identical to two shells that were found outside the bedroom of Sherman's parents. Additionally, deputies found a 12-gauge shotgun belonging to Sherman's parents hidden in a nearby pine tree. Sherman had used that same pine tree to hide items since his childhood. An F.B.I. examination of the weapon disclosed that it had fired the two expended shells found in the hallway of the Sherman's home and that fingerprints on the weapon were those of Timothy Sherman. Sherman's parents were slain by a shotgun blast. Any error in this instance was harmless beyond a reasonable doubt. *Dorsey* v. *State*, 276 Md. 638 (1976).

Sherman also avers that the trial judge erred in excluding the testimony of Gail Robinson, appellant's aunt. Ms. Robinson was the sister of Sherman's mother, Ann. She was to testify as to a conversation she had with her sister Ann just several hours before Ann's death. Defense proffered that Ann had said that Sherman was "great" and had "gone to bed without any problems." The testimony was offered to show Sherman's state of mind at the time of the murders. The court ruled that his testimony was inadmissible hearsay. Judge Whitfill was correct. The proffered evidence did not show Sherman's state of mind but rather that of his mother.

"II. Did the trial court commit reversible error by violating the appellant's constitutional right to due process and a fair trial in limiting the appellant's presentation of evidence to the jury?"

Sherman claims that he should have been allowed to cross-examine his paternal grandfather, Donald, in order to demonstrate the latter's discordant relationship with the murder victims. Judge Whitfill precluded Sherman's counsel from cross-examining the grandfather as to the following matters: 1) Mr. Sherman's claim against his son's estate for a firing pin assembly of a .22 rifle; 2) Mr. Sherman's refusal to provide his son and daughter-in-law with a wedding rehearsal dinner prior to their marriage; 3) Mr. Sherman's dealings regarding two pieces of family-owned property; 4) when Mr. Sherman last took his son, daughter-in-law, and grandson to dinner and when the murder victims last visited Mr. Sherman's home.

We think the questions to be no more than the proverbial "red herring" dragged across the trail in order to obfuscate the facts.

The right of cross-examination is not unlimited. *Waldron* v. *State*, 62 Md. App. 686, 696 (1985). The decision of whether to either allow or disallow questions on cross-examination is normally left the sound discretion of the trial judge. *Waldron* at 696; *Hopper* v. *State*, 64 Md. App. 97, 1093 (1985). In the instant case Judge Whitfill properly exercised his discretion and excluded the defendant's fishing expedition.

Sherman next asserts that the trial judge erred in refusing to allow him to adduce testimony regarding the bias of Donald Sherman and other family members. The issue is not whether the family was biased against Ann and William [*sic*] Sherman, the murder victims, but whether Timothy committed the double slayings. The bias is, in the circumstances, totally irrelevant. Of course, we recognize that Sherman sought to direct the jury's attention from himself to his grandfather or other family members. That tactic, however, falls far short of shifting culpability to the grandfather.

"III. Did the trial court commit reversible error in excluding the testimony of Dr. Richard Streete, D.V.M., as both an expert and fact witness concerning the behavior of Rascal, the appellant's and decedents' family pet?

Sherman maintains that the judge erred in prohibiting Dr. Richard Streete, a veterinarian, from testifying about the post-murder behavior of Rascal, the Sherman family dog.

The decision to admit or preclude expert testimony is vested in the sound discretion of the trial judge, and that decision will not be reversed in the absence of an abuse. *Simmons* v. *State*, 313 Md. 33, 43 (1988). Judge Whitfill, as we see it, did not abuse his discretion in finding that the psychological state of the Sherman's dog was irrelevant.

"IV. Did the trial court commit reversible error by violating the appellant's constitutional rights of due process and a fair trial by its failure both to supply the appellant an unredacted copy of the grand jury testimony of Cpl. Jordan Watts and undisclosed witness statements?"

Sherman asseverates that the trial judge erroneously precluded him from examining all of Sergeant Jordan Watts's grand jury testimony. He also raises a similar complaint about Watts's police report.

As to Watts's police report, Sherman was given seven pages of the 45 page report and advised that the remaining 38 pages consisted of witnesses' statements. Sherman's counsel said that if Watts confirmed that the undisclosed 38 pages pertaining only to witnesses' statements "that's the end of it. I won't go into it." Watts confirmed the matter. Thus, any objection has since been waived by counsel. See Md. Rule 2-517.

With respect to Watts's grand jury testimony, the circuit court redacted those portions of that evidence where Watts was quoting statements of people who had been interviewed. The defense desired to examine the materials not for the purpose of cross-examination but rather to determine what others might have said about the case.

The Court of Appeals in *Jones* v. *State*, 297 Md. 7, 14-15 (1983), held that "once a State's witness has testified on direct examination, a defendant is entitled to inspect the grand jury testimony for cross-examination purposes ...." This Court in *Ellison* v. *State*, 56 Md. App. 567, 578-79 (1983), said that the right of inspection did not apply when the inspection was for purposes other than cross-examination. *Ellison* is dispositive of this argument.

"V. Did the trial court commit reversible error when it violated the constitutional rights of the appellant by its failure to dismiss the indictments?"

Subsequently to the guilty verdict but prior to sentencing, Sherman's attorney was contacted by a member of the grand jury which returned the indictment in the instant case. The juror stated that, out of the panel of sixteen grand jurors, only eleven voted for an indictment. Sherman promptly requested a new trial. The request was denied by Judge Whitfill, who stated:

> "There are no reported votes of the Grand Jury. I found no law that says that it must be recorded, none has been cited to me, and I think that members of the Grand Jury coming forward and raising that after the fact is not sufficient to put

> the indictment in question. However, the case of *State* v. *Vincent*, 91 Md. 718 [1900], says that even if it were invalid, it was waived by having entered a plea to the merits going to trial."

State v. *Vincent* deals with a challenge to an indictment as a result of an insufficient number of persons constituting a grand jury. The statute under attack in *Vincent* was merely directly and "designed solely to secure the presence of a number sufficient for *twelve to concur* in an indictment. *Vincent* at 719. In Maryland, no man may be indicted by a grand jury consisting of less than twelve of his fellow citizens. *In re Report of Grand Jury*, 152 Md. 616, 621 (1927).

The issue in the case at bar is whether twelve jurors voted for the indictment. One grand juror's post-trial allegation that the indictment was returned by less than twelve persons does not warrant a dismissal of the indictment. Sherman failed to meet the heavy burden of showing that the indictment was handed up by less than the requisite number of grand jurors. Assuming without deciding that we are permitted to do so, without evidence showing clearly what transpired in the grand jury proceeding, we are unwilling to nullify a trial and vitiate an indictment.

Sherman further charges that the trial court should have dismissed the indictment because the prosecution withheld certain exculpatory evidence from the grand jury. The argument is devoid of any merit whatsoever; Sherman tilts at windmills. *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986), is dispositive of the case. There, Justice Rehnquist, delivering the opinion of the Court, stated:

> "But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." (Footnote omitted.)

"VI. Did the trial court commit reversible error by violating the appellant's constitutional rights of due process and a fair and impartial trial by not granting the appellant's motion for a new trial

due to the consideration by a juror or extrinsic evidence and violation of the instructions of court?"

Sherman argues that the trial court should have granted a new trial because a juror and wife drove to the neighborhood of the murder scene.

When the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not, "a sound balance is struck by a rule which looks to the probability of prejudice from the fact of extraneous matter in relation to the circumstances of the particular case." *Wernsing* v. *General Motors Corp.*, 298 Md. 406, 419-20 (1984). When ruling on a motion for new trial, the judge must evaluate the degree of probable prejudice to the defendant in order to discern whether a new trial is justified. *Wernsing* at 420.

The grant or denial of a motion for new trial rests within the sound discretion of the trial judge. *Eades* v. *State*, 75 Md. App. 411, 419-20 (1988). Judge Whitfill found that a new trial was not warranted, particularly in light of the numerous testimonial references, videotapes, and photographs relating to and depicting the crime scene. We perceive no abuse of discretion in that ruling.

Sherman next alleges that there was a violation of the sequestration order because of the fact that the juror was accompanied by the juror's wife when he visited the crime scene. Sherman asserts that conduct mandates reversal. Sherman's bald averment fails to indicate how the juror's improper action prejudiced the case.

"VII. Did the trial court commit reversible error in not giving a manslaughter instruction to the jury and thereby prohibiting appellant's counsel the benefit of such argument to the jury?"

Sherman complains that the trial court erroneously declined to instruct the jury on the crime on manslaughter.

There is a four-pronged test used to determine whether a particular crime was manslaughter, namely:

"A. Was there an inadequate provocation for the killing?

B. Was the killing done in the heat of passion?

C. Did the killing immediately follow the provocation without the reasonable opportunity for the passion to subside or cool?

D. Was there a causal connection between the killing, the provocation, the passion, and the fatal act?"

R. GILBERT AND C. MOYLAN, *Maryland Criminal Law Practice and Procedure*, § 1.7-5 AT 24 (1983).

Each of these questions can be answered in the negative in the case *sub judice*. Ergo, the trial judge did not err in refusing to instruct the jury concerning manslaughter. The crime of manslaughter was not an issue in the instant matter.

"VIII. Did the trial court commit reversible error in allowing demonstrative evidence to be presented before the jury without the laying of a proper foundation thereby denying the appellant's constitutional right of due process and a fair and impartial trial?"

Sherman challenges the trial court's decision permitting the State to introduce a box of shotgun shells, along with a paper bag that was provided to the buyer at the time the shells were purchased. The State presented the evidence in order to demonstrate to the jury that Sherman had the opportunity to buy shotgun shells just prior to the murders.

> "The rule is well established that physical evidence need not be positively connected with the accused or the crime to be admissible; it is admissible where there is a reasonable probability of its connection with the accused or the crime, the lack of positive identification affects only the weight of the evidence."

Doye v. *State*, 16 Md. App. 511, 519 (1973), cert. denied, 268 Md. 747 (1973). Speaking through Judge Thompson, this Court noted, "It is also relevant to show that the defendant owned or had access to any article with which the crime was or could have been committed." *Doye* at 518, citing 1 Wharton, *Criminal Evidence* (12th ed.), § 203 at 408. The paper bag in question was offered into evidence on the basis of the testimony of several witnesses and a number of other items already in evidence. We think the evidence both relevant and admissible.

"IX. Did the trial court commit reversible error by violating the constitutional rights of due process and fair and impartial trial when it conducted ex parte communication with the jury without the knowledge of the appellant?"

Sherman states that the trial judge erred when he engaged in an undisclosed *ex parte* communication with the jury. A juror described the trial judge's communication as follows:

> "Okay. What he did, come back and we were getting ready to go to the motel, and somehow along the line, and I don't know the exact words, we were talking about the motel, and the overnight stay, and it came back as, you know, and he said that, you know, this was his first time, to bear with him, and he would work with us with the overnight stay, and then it was something said to the effect of the cost of burden, cost of the taxpayers."

It is, of course, the better practice for judges to avoid contact with the jury other than that which the judge's official duty requires. A judge's innocent remark may be misinterpreted by a juror and might disadvantage either party to the litigation. While we think the judge's comment to the jury ill advised, we, nevertheless, fail to see how the remarks prejudiced Sherman's case one iota. If there be any error, it was harmless beyond a reasonable doubt. *Dorsey* v. *State*, 276 Md. 638 (1976).

"X. Did the destruction of evidence by the State violate the appellant's constitutional rights?"

Finally, Sherman contends that the failure by the State to preserve the "bedding" upon which the bodies of the murder victims were found violated the discovery rules and the State's duty to produce exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Addressing a similar contention in *DeLuca* v. *State*, ____ Md. App. ____, No. 545, September Term, 1988, filed March 1, 1989, slip op. at 15, Judge Moylan penned: "Even if the State were grievously at fault as alleged, that would do not more than lay the predicate for possible error by the trial judge." As in *DeLuca*, nowhere in the record are we pointed to any particular ruling by the trial judge that was allegedly erroneous. Sherman's claim is baseless.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.